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No. 621

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

THE CORAL GABLES FIRST NATIONAL BANK, a banking institution organized under the laws of the United States of America, having its principal place of business in the City of Coral Gables, Florida, and PAN AMERICAN BANK OF MIAMI, a banking institution organized and existing under the laws of the State of Florida, having its principal place of business in the City of Miami, Dade County, Florida, and a member of the Federal Reserve System of the United States,

Petitioners,

vs.

CONSTRUCTORS OF FLORIDA, INC., a Florida corporation having its principal place of business in the City of Coral Gables, Dade County, Florida, and JOHN NICHOLAS, as Trustee under Chapter X, Federal Bankruptcy Reorganization Proceedings now pending in the United States District Court, Southern District of Florida, CITY OF WEST PALM BEACH, FLORIDA, a municipal corporation organized and existing under the laws of the State of Florida, AMERICAN SURETY COMPANY OF NEW YORK, a New York corporation authorized to do business in the State of Florida, TOM MAXEY, RUSSELL A. ORTMAYER, RICHARD R. REYNOLDS, JIM M. LANCASTER, JR., EARL L. GOODWIN, ISLAND CONSTRUCTION COMPANY, a corporation organized under the laws of Puerto Rico and having its principal place of business in Dade County, Florida, H. S. FLAGG and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

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INDEX

A. The Opinions Below 2-6

B. Grounds on Which Jurisdiction of This Court is Invoked 6-11

C. Questions Presented 11-13

D. Statutes and Rules Involved 13-17

E. Statement of the Case 17-24

F. Specification as to the stage of the proceeding in the Court of the First Instance and in the Appellate Court at which and the manner in which the Federal Question sought to be reviewed was raised, and the method of raising same 25-27

G. Reasons for Granting the Writ 27-31

H. Argument—

Point 1—Has the District Court of Appeal of Florida, Third District, in its opinion of March 22, 1960, effective September 19, 1960, as interpreted and finalized by the order on the mandate entered on April 14, 1961, and as reconstrued by the District Court of Appeal of Florida, Third District, by its opinion quashing the interlocutory appeal dated May 25, 1961, petition for certiorari and rehearing thereon denied by the Supreme Court of Florida September 26, 1961, violated the specific provisions of United States Statute, Title 12, U.S.C.A., Paragraph 86, in allowing excessive counterclaims and set-offs and penalties not authorized under said statute? 32-40

Point 2—Has the District Court of Appeal of Florida, Third District, in its opinion and mandate of March 22, 1960, effective September 19, 1960, as interpreted and finalized by the order on the mandate entered on April 14, 1961, and as reconstrued by the District Court of Appeal of Florida, Third District, by its opinion quashing the interlocutory appeal dated May 25, 1961, petition for certiorari and rehearing thereon denied by the Supreme Court of Florida, September 26, 1961, so construed the effect and operation of the United States Statute, U.S.C.A., Title 12, Paragraphs 85 and 86, limiting the amount of allowance of usury penalty against a National Bank, in such a way as to make it void and inoperative for all practical purposes? 40-43

Point 3—Where the Federal Statute covering allowable usury penalties against a National Bank under the provisions of U.S.C.A., Title 12, Paragraph 86, is restricted to a defense in an action to enforce the debt, to a forfeiture of the interest unpaid but contracted for, without any invasion of the principal amount due, or where in the event any usurious interest is actually paid, to a separate suit by the one making the payment for double the amount of the interest actually paid, may a State Court upon alleged equitable grounds by way of penal or compensatory damages, impose collateral damages and penalties against a National Bank in excess of the total amount of the principal involved in the transaction? 44-51

Point 4—May a State Court, in addition to allowing interest penalties and forfeiture of the

amount of the principal (all in excess of the original amount of the loan from the National Bank), impose additional penalties by way of punitive or exemplary damages by forfeiting other collateral which the Bank holds, because it is claimed that the National Bank came into a State Court of Equity without clean hands? 51-53

Point 5—Where, after a loan has been consummated by a National Bank to a corporation, and where the privity of contract is solely between the National Bank and the corporate borrower, and where several weeks after the loan is consummated the National Bank, pursuant to its general banking practice under the Federal Reserve System, grants a simple trust receipt or participation for a part of this loan on a straight simple 5% interest participation, does that subsequent transaction with the State Bank relate the whole transaction from the inception as a co-adventure or joint adventure or agency contract so as to avoid the direct application of the federal statute on usury, and bring into play the state penalties applicable only to a State Bank? 53-67

Conclusion 68-69

CASES CITED

Brown v. *Marion National Bank of Lebanon*, Kentucky. 169 U.S. 416, 18 S. Ct. 390 39

Butler v. *Smith*, 104 So.2d 868 10

Carter v. *Leon Loan & Finance Company*, 146 So. 664 50

Conner Air Lines, Inc., et al. v. *Aviation Credit Corp. et al.*, 280 F.2d 895, 81 S. Ct. 274 35

Coral Gables First National Bank and Pan American Bank of Miami et al. v. *Constructors of Florida et al.*, 119 So.2d 741 ..... 2, 6, 25, 26, 37, 41
Coral Gables First National Bank et al. v. *Constructors of Florida et al.*, 132 So.2d 806; 133 So.2d 319 ..... 6, 27
Deitrick v. *Greaney*, 309 U.S. 190, 84 L. Ed. 694, 60 S. Ct. 480 14
Department of Banking, State of Nebraska, v. *Pink*, 63 S. Ct. 233, 317 U.S. 264, 87 L. Ed. 254 ..... 8, 9
Farmers & Mechanics National Bank v. *Dearing*, 91 U.S. 29, 23 L. Ed. 196 39
Federal Reserve Bank of Richmond, Va., v. *Duffy et al.*, 188 S.E. 82, 210 North Carolina 598 58
First National Bank of Jacksboro v. *Lasater*, 196 U.S. 115, 25 S. Ct. 206 39
Lavender, Admr., v. *Kurn*, 67 S. Ct. 111, 329 U.S. 762; 326 U.S. 713, 66 S. Ct. 232; 327 U.S. 645, 66 S. Ct. 740; 189 S.W.2d 253; 195 S.W.2d 460 9
Lucas v. *Federal Reserve Bank*, 59 F.2d 617, 620 59-60
McCarthy v. *First National Bank of Rapid City*, South Dakota, 32 S. Ct. 240, 223 U.S. 493 40
McCollum v. *Hamilton National Bank of Chattanooga*, 58 S. Ct. 568, 303 U.S. 245, 82 L. Ed. 819 ..... 27, 30, 37, 38, 42
McGillick v. *Chapman*, 134 Fla. 220, 184 So. 26 35
Rosenblum v. *Hart*, 95 So.2d 18 35
Ross v. *Atlas Finance Corp.*, 113 Fla. 793, 152 So. 410 35
Schumacher v. *Lawrence*, 108 F.2d 576 ..... 30, 31
Schuyler Nat. Bank v. *Gadsden*, 191 U.S. 451, 24 S. Ct. 129, 48 L. Ed. 258 16
Shorr v. *Skafte*, 90 So.2d 604 50
Small Business Administration, Petitioner, v. *McClellan, Trustee*, 81 S. Ct. 191 62-67
Smith v. *Butler*, 81 S. Ct. 937 ..... 9, 10
Talbot v. *First National Bank of Sioux City*, Iowa, 22 S. Ct. 612, 185 U.S. 172 ..... 39, 40
Wenck v. *Insurance Agents Finance Corporation*, 99 So.2d 883 ..... 35, 36
Wilson v. *Conner*, 106 Fla. 6, 142 So. 606 35

STATUTES

Florida Statutes, Sec. 687.03	32, 33
Florida Statutes, Sec. 687.04	18, 33
Florida Statutes, Sec. 687.07	18, 34
United States Code, 1257, Par. 3	11
U.S.C.A., Title 12, Pars. 85 and 86	12, 15, 16, 25, 27, 28, 30, 32, 40, 44, 58, 66, 67, 68
U.S.C.A., Title 12, Par. 1	14, 54
U.S.C.A., Title 12, Par. 21	14, 54

RULES

Comptroller of Currency Ruling 1135A	17, 55-56
Opinion of Comptroller of Currency 9530	54

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THE CORAL GABLES FIRST NATIONAL BANK, a banking institution organized under the laws of the United States of America, having its principal place of business in the City of Coral Gables, Florida, and PAN AMERICAN BANK OF MIAMI, a banking institution organized and existing under the laws of the State of Florida, having its principal place of business in the City of Miami, Dade County, Florida, and a member of the Federal Reserve System of the United States,

Petitioners,

vs.

CONSTRUCTORS OF FLORIDA, INC., a Florida corporation having its principal place of business in the City of Coral Gables, Dade County, Florida, and JOHN NICHOLAS, as Trustee under Chapter X, Federal Bankruptcy Reorganization Proceedings now pending in the United States District Court, Southern District of Florida, CITY OF WEST PALM BEACH, FLORIDA, a municipal corporation organized and existing under the laws of the State of Florida, AMERICAN SURETY COMPANY OF NEW YORK, a New York corporation authorized to do business in the State of Florida, TOM MAXEY, RUSSELL A. ORTMAYER, RICHARD R. REYNOLDS, JIM M. LANCASTER, JR., EARL L. GOODWIN, ISLAND CONSTRUCTION COMPANY, a corporation organized under the laws of Puerto Rico and having its principal place of business in Dade County, Florida, H. S. FLAGG and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

A. THE OPINIONS BELOW.

In the October Term, 1960, of this Court a Petition for Writ of Certiorari was directed by the same petitioners against the same respondents. The Petition and the accompanying record were numbered No. 559, October Term, 1960.

The record submitted in that case, and as shown in the index, began with the complaint for the foreclosure of three mortgages, filed September 20, 1957, in the Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida, in chancery, No. 205613-E. Plaintiff was The Coral Gables First National Bank, a national banking institution, and the Pan American Bank of Miami, a State banking institution under the laws of Florida, and a member of the Federal Reserve System was joined as a party plaintiff because that State Bank held certain participation certificates involved in the three mortgage loan held by the National Bank. The claim of the State Bank was based upon its participation in the assets which were mortgaged as security for the original loans with the National Bank.

This proceeding resulted in a decree by the Circuit Court of Dade County, Florida, the first decree being dated June 26, 1958 and designated "Partial Final Decree of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida". A second order amending the Partial Final Decree of June 26, 1958, was entered on July 2, 1958.

The opinion of the District Court of Appeal of Florida, Third District, was rendered on March 22, 1960. Petition for rehearing was denied on May 4, 1960 (See 119 So.2d 741).

A petition was then filed by both The Coral Gables First National Bank and the Pan American Bank of Miami to the Supreme Court of Florida on May 18, 1960, which opinion operated as a supersedeas and stayed all proceedings in the lower court, as will show by order of the Supreme Court of Florida of May 24, 1960.

The Supreme Court of Florida denied the petition for certiorari without an opinion, and denied a petition for rehearing, final order being dated September 19, 1960. Under the rulings of the Supreme Court of Florida, this denial was not on the merits, and left the opinion and decision of the District Court of Appeal of Florida, Third District, originally dated March 22, 1960, as the final opinion of the highest court of Florida then having jurisdiction of the subject matter and the parties.

Petitioners herein filed their petition for writ of certiorari in this Court on or about December 2, 1960, in which petitioners submitted a record beginning with the filing of the complaint of September 20, 1957 through May 4, 1960. Attached to the appendix to the petition for certiorari in case No. 559, October Term, 1960, were copies of the order denying the petition for certiorari by the Supreme Court of Florida on September 19, 1960. Briefs for the respondents were filed in this Court in January, 1961, and petitioners' reply brief was filed on February 10, 1961. This Court entered its order denying the petition for certiorari on February 20, 1961.

After this Court denied the petition for certiorari to the District Court of Appeal of Florida, Third District, on the date above set forth, the cause was set for hearing again in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, which resulted in the entry of a new decree by the said Circuit Court dated

April 14, 1961 (Tr. supporting this Petition for Certiorari, p. 175).

An interlocutory appeal was entered from this judgment or decree of April 14, 1961, to the District Court of Appeal of Florida, Third District, and on May 25, 1961, that Court entered an order granting the motion of appellees to quash the interlocutory appeal from the final order of the Circuit Court of the Eleventh Judicial Circuit of Dade County, Florida, dated April 14, 1961.

A petition for certiorari was filed in the Supreme Court of Florida within 15 days from the order of the District Court of Appeal of Florida quashing the appeal, and the Supreme Court of Florida entered its order denying the said petition. The order was announced on July 24, 1961. Filing of the same was delayed pending the disposition of the petition for rehearing filed by the petitioners, and both orders were then certified by the Clerk of the Supreme Court to the District Court of Appeal of Florida, Third District, on the 26th day of September, 1961, and lodged in the Clerk's Office of the District Court of Appeal of Florida at Miami, Florida, on September 27, 1961.

We are attaching as an appendix to this petition for certiorari:

Original "Partial Final Decree" of June 26, 1958, of the Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida, and Order of July 2, 1958, amending said Decree (Appendix A1-A19).

Opinion of District Court of Appeal of Florida, Third District, dated March 22, 1960 (Appendix A19-A34).

Mandate of District Court of Appeal of Florida, Third District, based upon that opinion (Appendix A35-A36).

Note:

The said written opinion of the District Court of Appeal of Florida, Third District, contains a detailed discussion of portions of the issues involved, but affirms in part and reverses in part the original decisions of the lower court, so that the opinion of the Appellate Court is not completely self-contained. References to the decree as amended in the lower court, together with reference to the mandate of the District Court of Appeal issued pursuant to that opinion of March 22, 1960, are necessary in order to ascertain just what was determined.

In our original petition for certiorari filed in this Court in December, 1960, we attached as an appendix these same opinions. We are now attaching to the appendix supporting this petition for certiorari:

Final Decree of the Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida, entered on the 14th day of April, 1961 (Appendix A37-A41).

Notice of Interlocutory Appeal to the District Court of Appeal of Florida, Third District, to review the Order and Judgment on the Mandate, entered on the 14th day of April, 1961 (Appendix A42-A43).

Assignments of Error filed on the 17th day of April, 1961 (Appendix (A44-A47).

Order of District Court of Appeal of Florida, Third District, entered May 25, 1961, quashing this interlocutory appeal, based upon the assignments of error and appeal proceeding hereinbefore referred to (132 So. 2d 806) (Appendix A48).

The petition for certiorari filed in the Supreme Court of Florida in June, 1961, copy of which was simultaneously filed with the Clerk of the District Court of Appeal of Florida, Third District, is voluminous, but is a part of the transcript of record submitted herewith under separate cover. The Federal questions involved

were again raised in that petition for certiorari as reflected in the record (Tr. 231-300).

Order of Supreme Court of Florida dated July 24, 1961, denying the petition for certiorari, and the order of the Supreme Court of Florida of September 26, 1961 (133 So.2d 319), denying the petition for rehearing; showing certification of mailing of both orders to the District Court of Appeal of Florida, Third District, and filing therein on September 27, 1961 (Appendix A49-A50).

B. GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

1. At the time the original petition for certiorari was filed in this Court in case No. 559, October Term, 1960, petitioners were confronted with the question as to whether or not the opinion of the District Court of Appeal of Florida, Third District, dated March 22, 1960, reported 119 So.2d 741, was a final judgment or decree to which a petition for certiorari to the Supreme Court of the United States would lie, or did this decree fall into the category of the granting of a new trial by the Appellate Court?

The mandate of the District Court of Appeal of Florida, Third District (Appendix A35-A36) is as follows:

"MANDATE FROM DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

To the Honorable, the Judges of the Circuit Court for the Eleventh Judicial Circuit of Florida, Greeting:

Whereas, Lately in the Circuit Court of The Eleventh Judicial Circuit in and for the County of Dade in a cause wherein

THE CORAL GABLES FIRST NATIONAL BANK, etc.
and PAN AMERICAN BANK OF MIAMI, etc.,
Plaintiffs and Defendants

CONSTRUCTORS OF FLORIDA, INC., et al

(Chancery No. 205613)

the decree of said Circuit Court was rendered June 30, 1958, as by the inspection of the transcript of the record of the said Circuit Court which was brought into the District Court of Appeal, Third District of the State of Florida, by virtue of appeals agreeably to the laws of said State in such case made and provided, fully and at large appears.

And Whereas, at the January Term of said District Court of Appeal holden at Miami, A. D. 1960, the said cause came on to be heard before the said District Court of Appeal on the said record of March, A.D., 1960 the said District Court of Appeal rendered its opinion and judgment in said cause as per copy thereof hereto attached and made a part hereof.

In Consideration Whereof, It Is Ordered by the Court that the appellants do have and recover of and from the appellees costs in this behalf expended herein taxed at Twenty-five Dollars, and that all other costs shall be taxed in the court in which the appeal was entered, therefore

You Are Hereby Commanded, That such further proceedings be had in said cause as according to right, justice, the judgment of said District Court of Appeal and the laws of the State of Florida, ought to be had, the said decree of the Circuit Court notwithstanding.

Witness, The Honorable Mallory Horton, Chief Judge of said District Court of Appeal, and the seal of said Court at Miami, this 4th day of May, 1960.

s WILLIAM P. CARTER
Clerk District Court of Appeal of Florida, Third District.

A True Copy

ATTEST:

William P. Carter
Clerk District Court of
Appeal, Third District."

At this stage of the proceeding, petitioners were confronted with the opinion of this Court of *Department of Banking, State of Nebraska, v. Pink*, 63 S. Ct. 233, 317 U.S. 264, 87 L. Ed. 254, which in effect held that where a decision of a State Appellate Court was final, with the mere exception as provided for certain administrative or ministerial functions to be performed by the lower court, then the petition for certiorari should be filed within 90 days from the date of that appellate court decision. In the case above mentioned, the Court of Appeals of New York affirmed the decision of the lower courts, but ordered a remittitur entered.

In the case at bar, the District Court of Appeal of Florida, Third District, although reversing the lower court in many factors, including the reversal on the construction of the Federal Statute for usury, attempted to define the formula under the Federal Statute for the assessment of usury penalties, which appeared to be contrary to the plain language of that statute as interpreted by the several decisions of the Supreme Court of the United States.

We were also confronted with a case which was decided by the Supreme Court of the United States subsequent to the *Department of Banking, State of Nebraska, v. Pink decision, supra*, which seemed to change or seriously confuse the decision of that case. This was the case of *Lavender, Admr., v. Kurn*, 67 S. Ct. 111, 329 U.S. 762; 326 U.S. 713, 66 S. Ct. 232; 327 U.S. 645, 66 S. Ct. 740; 189 S.W.2d 253, 195 S.W.2d 460. This decision, which first arose from litigation in the Missouri State Courts, seemed to definitely hold that where the petition for certiorari was directed to the final appellate court of a State, there must be a definite finality before the Supreme Court of the United States would even consider the granting of a petition for certiorari.

Because of the uncertainty of the two decisions of this Court, the petitioners submitted the petition for certiorari to this Court even before the cause was reconsidered in the lower court under the mandate.

It is respectfully shown that the exact application of the ruling of this Court on that subject matter involving the granting of a petition for certiorari in State Court proceedings was not fully clarified as applicable to a situation such as presented here, until the opinion of this Court in the case of *Bert Smith* v. *J. Turner Butler et al., Trustees*, 81 S. Ct. 937, Case No. 313, decided April 24, 1961. This was a very similar type of procedure, involving an opinion and proceedings in the District Court of Appeal of Florida, Third District, wherein this Court granted certiorari (364 U.S. 869, 81 S. Ct. 113, 5 L. Ed. 2d 92).

In that case a suit had been prosecuted in the Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida, resulting in a verdict for the plaintiff. An ap-

peal was taken to the District Court of Appeal of Florida, Third District, and that Court reversed the judgment of the Circuit Court without passing upon the question of which of two Federal Statutes was applicable. Its decision was based upon the fact that there was not sufficient evidence to sustain a verdict for the plaintiffs. See *Butler v. Smith*, 104 So.2d 868. The case was then sent back for a new trial. The plaintiff again submitted the same record to the trial judge without amendment, and the trial judge, following the reasoning of the Appellate Court, then entered a judgment in favor of the defendant. The plaintiff thereupon took an interlocutory appeal provided for under the Florida Appellate Rules back to the District Court of Appeal of Florida, Third District, and in that appeal alleged that the sole purpose of the appeal was for the purpose of obtaining a record upon which the Court's prior decision of *Butler v. Smith*, 104 So.2d 868, could be reviewed by the Supreme Court of the United States. The District Court of Appeal, as aforesaid, affirmed the judgment on the second appeal (118 So.2d 237). In that opinion it was pointed out by the District Court of Appeal of Florida, Third District, that they noted counsel for the plaintiff was taking the appeal only to satisfy the requirements of the United States Supreme Court rules and statutes applicable thereto. That provision is mentioned in the opinion. Then counsel for the appellants, after that Appellate Court had affirmed the new decision of the lower court, sued out a petition for certiorari to the Supreme Court of Florida, which was denied. Then, and then only, did plaintiff's counsel sue out the petition for certiorari in the Supreme Court of the United States, and this Court granted that certiorari.

In the dissenting opinion it was pointed out (81 S.Ct. 937, 939) that under these proceedings in the State Court,

and since the first appeal from the lower court to the District Court of Appeal of Florida resulted in a prior reversal and a new trial, there could be no final judgment, the review of which might have been sought in the Supreme Court of the United States, until a judgment was entered on a re-trial. This Court granted the petition for certiorari directed to the District Court of Appeal of Florida, Third District, and upheld that type of procedure, but the Court did by a divided opinion rule out the merits of the controversy, but not on the question of the procedure.

Counsel for the petitioners in this case have proceeded on exactly the same routine of exhausting their remedy from the new decree of April 14, 1961, by making appropriate attempt to have the District Court of Appeal of Florida review that final judgment and decree, and also thereafter to have the Supreme Court of Florida take jurisdiction. As above set forth, the District Court of Appeal of Florida, Third District, quashed the appeal from the second final decree of April 14, 1961, and the Supreme Court of Florida refused to take jurisdiction on certiorari directed to that Court, as will show by its order of September 26, 1961.

2. The statutory provision believed to confer jurisdiction of this Court to review the judgment in question by writ of certiorari is 28 U.S.C. 1257, Paragraph 3.

C. QUESTIONS PRESENTED.

1. Has the District Court of Appeal of Florida, Third District, in its opinion of March 22, 1960, effective September 19, 1960, as interpreted and finalized by the order on the mandate entered on April 14, 1961, and as recon-

strued by the District Court of Appeal of Florida, Third District, by its opinion quashing the interlocutory appeal dated May 25, 1961, petition for certiorari and rehearing thereon denied by the Supreme Court of Florida September 26, 1961, violated the specific provisions of United States Statute, Title 12, U.S.C.A., Paragraph 86, in allowing excessive counterclaims and set-offs and penalties not authorized under said statute?

2. Has the District Court of Appeal of Florida, Third District, in its opinion and mandate of March 22, 1960, effective September 19, 1960, as interpreted and finalized by the order on the mandate entered on April 14, 1961, and as reconstrued by the District Court of Appeal of Florida, Third District, by its opinion quashing the interlocutory appeal dated May 25, 1961, petition for certiorari and rehearing thereon denied by the Supreme Court of Florida, September 26, 1961, so construed the effect and operation of the United States Statute, U.S.C.A., Title 12, Paragraphs 85 and 86, limiting the amount of allowance of usury penalty against a National Bank, in such a way as to make it void and inoperative for all practical purposes?

3. Where the Federal Statute covering allowable usury penalties against a National Bank under the provisions of U.S.C.A., Title 12, Paragraph 86, is restricted to a defense in an action to enforce the debt, to a forfeiture of the interest unpaid but contracted for, without any invasion of the principal amount due, or where in the event any usurious interest is actually paid, to a separate suit by the one making the payment for double the amount of the interest actually paid, may a State Court upon alleged equitable grounds by way of penal or compensatory damages impose collateral damages and penalties against a National Bank in excess of the total amount of the principal involved in the transaction?

4. May a State Court, in addition to allowing interest penalties and forfeiture of the amount of the principal (all in excess of the original amount of the loan from the National Bank), impose additional penalties by way of punitive or exemplary damages by forfeiting other collateral which the Bank holds, because it is claimed that the National Bank came into a State Court of Equity without clean hands?

5. Where, after a loan has been consummated by a National Bank to a corporation, and where the privity of contract is solely between the National Bank and the corporate borrower, and where several weeks after the loan is consummated the National Bank, pursuant to its general banking practice under the Federal Reserve System, grants a simple trust receipt or participation for a part of this loan on a straight simple 5% interest participation, does that subsequent transaction with the State Bank relate the whole transaction from the inception as a co-adventure or joint adventure or agency contract so as to avoid the direct application of the Federal Statute on usury, and bring into play the State penalties applicable only to a State Bank?

D. STATUTES AND RULES INVOLVED.

The control question involved which presents the Federal question is the fact that the courts of Florida have ignored the provisions of an Act of Congress affecting and applicable to National Banks, which act has limited and defined the amount of usury penalties which may be invoked by a State or a Federal Court where it is claimed that usury has been collected by a National Bank in a loan made by that Bank to a borrower which is in excess of the laws of the State in which the National Bank made the loan.

For the purpose of this petition for certiorari so as to simplify and pinpoint the violation of the Federal Statute by a State Court, counsel will assume, for the sake of argument, but without any admission at this stage of the procedure, that the usury statutes of Florida were violated by the National Bank. Under that assumption the question arises as to what penalties could a State Court assess against the National Bank, or parties in participation with it, who participated subsequent to the time the initial loan was made by the National Bank to a corporate borrower in the State of Florida.

A brief reference to several controlling statutes of the United States will clarify the background of this question.

United States Code Annotated, Title 12, §1, creates the Bureau of the Comptroller of the Currency, which under the general supervision of the Board of Governors of the Federal Reserve System created the Comptroller of the Currency as the chief officer of the banking system for National Banks under the Federal Reserve System.

United States Code Annotated, Title 12, §21, provides for the creation of National Banks through the operation of the Comptroller of the Currency, which authorized the creation of a complete system for the establishment and government of National Banks as distinct and separate from any power of the State Courts or the laws of the State to interfere with their operation or control except insofar as it may be permitted by the Congress (See *Deitrick* v. *Greaney*, 309 U.S. 190, 84 L. Ed. 694, 60 S. Ct. 480).

Once a National Bank is established, it is solely under the supervision of the Comptroller of Currency, the Federal Reserve Board and the specific acts of Congress, and may be sued, taxed or controlled by State laws or State

Courts only as specifically authorized by the Acts of Congress.

Congress adopted two sections which are applicable to usury claims or penalties against National Banks, regardless of what State the banks may be operating in. U.S.C.A., Title 12, § 85, is as follows:

> *Rate of interest on loans, discounts and purchases* Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such

purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

Title 12, § 86, is as follows:

"*Usurious interest; penalty for taking; limitations*
The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided*, that such action is commenced within two years from the time the usurious transaction occurred."

It has been judicially determined over a period of many years that the provisions of Section 85 of Title 12 and Section 86 fixing the rate of interest which may be taken by a National Bank, and imposing penalties for taking usurious interest, are exclusive of State legislation and supersede the State laws so far as National Banks are concerned. See *Schuyler Nat. Bank* v. *Gadsden*, 191 U.S. 451, 24 S. Ct. 129, 48 L. Ed. 258.

In addition to the above, there is involved the construction of Comptroller of Currency Ruling 1135A, providing for, and defining the status of, and participation permitted by a National Bank with members of the Federal Reserve System, whether State or Federal. This is as follows (see Official Rules and Regulations of Comptroller of Currency, United States of America):

"Comptroller of Currency Ruling 1135A.

1135A. Sale of loan participations to other banks on a 'last in-first out' basis.

The sale of a participation in a loan to another bank (usually the sale of the 'overline' or legally excessive portion of a loan) under an arrangement whereby the placed portion of the debt must first be extinguished subordinates the interest of the selling bank. It is unsound to place the selling bank in a position whereby any loss that may occur on the entire loan up to the amount of the selling bank's participation must be borne by it, and 'overline' participations the intent and purpose of R.S. 5200 would be nullified under an agreement having this effect. To avoid this possibility, participation arrangements giving to one of the participating banks an earlier maturity or preference with respect to payment of the obligation(s) in the regular course of business, should provide that in the event of default (interest and or principal payments past due and unpaid for such period as the participants may by agreement determine) on the loan, the appointment of a receiver, or bankruptcy of the borrower, the participating banks shall share in all subsequent loan payments and collections in proportion to the percentage of participation held by each bank at the time of the default, the appointment of a receiver, or bankruptcy. With respect to participations in real estate loans see Paragraph 2715."

E. STATEMENT OF THE CASE.

This suit was instituted in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, by The Coral Gables First National Bank, seeking to foreclose three separate and distinct notes and mortgages. The mortgages encumbered primarily equipment belonging to Constructors of Florida, Inc., the mortgagor. One of the

notes was also secured by the assignment of a public contract for sewer construction work for the City of West Palm Beach, Florida, which contract had been awarded to Constructors of Florida, Inc. The other co-plaintiff, Pan American Bank of Miami, a Florida state banking corporation, also joined as co-plaintiff because it held a certificate of participation from The Coral Gables First National Bank evidencing the purchase of a participation in the loans in question. The notes and mortgages, however, ran solely to The Coral Gables First National Bank. The defendant, Constructors of Florida, Inc., filed an answer setting up the defense of usury and also filed a counter-claim in which it was alleged that the loan transactions in question were usurious in violation of Section 687.04, Florida Statutes, and 687.07, Florida Statutes, and prayed that the Court invoke both statutes, not only against The Coral Gables First National Bank, but as against any equitable right of distribution in favor of the Pan American Bank of Miami by virtue of its participation agreement with The Coral Gables First National Bank.

Briefly, the pertinent facts are that on July 25, 1956, Constructors of Florida borrowed $22,222.32 from The Coral Gables First National Bank, and secured the same by a chattel mortgage on certain equipment of Constructors of Florida. One day prior thereto, on July 24, 1956, the said National Bank had made a loan in the principal amount of $148,305.36, also secured by chattel mortgage upon equipment of Constructors of Florida. Shortly thereafter The Coral Gables First National Bank made an additional loan to Constructors in the amount of $442,400.00, which loan was secured by an assignment of a water and sewer contract which Constructors had entered into with the City of West Palm Beach, Florida. Also, as collateral security for this loan there was a chattel mortgage encumbering

certain machinery and equipment of Constructors upon which The Coral Gables First National Bank held two prior liens by reason of two prior loans made in July of 1956. The promissory note evidencing the loan was payable in twenty-three monthly installments of $3,000.00 each and a balloon installment at the end of the twenty-fourth month of $373,400.00, with interest at the rate of 5% per annum. The Coral Gables First National Bank disbursed the proceeds of this loan as follows:

A. Sixty Thousand Dollars was utilized to repay a prior loan made by Constructors from The Coral Gables First National Bank in the amount of Sixty Thousand Dollars.

B. Two Hundred Two Thousand Five Hundred Sixty-Two Dollars and Thirty-Eight Cents was deposited directly to the account of Constructors of Florida in The Coral Gables First National Bank.

C. Forty-Four Thousand Two Hundred Forty Dollars was retained by The Coral Gables First National Bank as advance interest for two years.

D. One Hundred Thirty-Five Thousand Five Hundred Ninety-Seven Dollars and Sixty-Two Cents was deposited into an account of Constructors of Florida known as Collateral Account No. 1. This account required the signature of an officer of The Coral Gables First National Bank and an officer of Constructors of Florida. The funds in Collateral Account No. 1 were to be disbursed as the water and sewer contract progressed, in the nature of a construction advance. Disbursements were made from Collateral Account No. 1 upon request of Constructors from November 23, 1956 through January 7, 1957, when the entire Collateral Account No. 1 was exhausted by reason of disbursing the same to Constructors of Florida.

On November 19, 1956, The Coral Gables First National Bank offered a participation to Petitioner, Pan American Bank of Miami, a State bank, in the loan to Constructors to the extent of $243,320.00, the same being a 55% participation in the loan. The Pan American Bank was to receive 5% simple interest on its participation. It did not receive any part of the $44,240.00 retained by The Coral Gables First National Bank as advance interest. The participation certificate was approved by the Board of Directors of Pan American Bank of Miami on November 28, 1956, and accepted on that same date. Beginning about November 29, 1956, and continuing through March 1, 1957, various payments became due to Constructors of Florida from the City of West Palm Beach, and these moneys were deposited by prior agreement between The Coral Gables First National Bank and Constructors of Florida into an account of Constructors known as Collateral Account No. 2. This account also required the signature of one officer of Constructors and one officer of The Coral Gables First National Bank. As the monthly payments became due, there was disbursed from Collateral Account No. 2 the amount of each monthly payment. This situation continued until March of 1957. At that time Constructors, by reason of other jobs which it had undertaken, was in financial difficulty and in default under both the prior mortgages given in July, 1956, to secure loans in the original principal amounts of $22,222.32 and $148,305.36, respectively. The Coral Gables First National Bank, exercising its rights under its agreement with Constructors of Florida as contained in the promissory note, applied all of the moneys in Collateral Account No. 2 in reduction of the indebtedness of Constructors on its note of November 14, 1956, thereby reducing the principal balance outstanding to $253,859.33. At this point, pursuant to the contractual agreement between Constructors of Florida and The Coral

Gables First National Bank, the Bank was obligated to adjust the interest. This was done, and a credit was given to Constructors of Florida of $35,584.06, as is evidenced by the new agreement entered into March 20, 1957, between Constructors of Florida, The Coral Gables First National Bank and American Surety Company of New York, which was the surety for Constructors on certain bonds. This new agreement accomplished basically the following:

All of the proceeds becoming available to Constructors of Florida as work progressed on the water and sewer contract of the City of West Palm Beach were to be paid to American Surety Company, as Trustee. The $442,400.00 loan of November 14, 1956, which had been reduced by payments and credits to $218,275.27, was rewritten on a demand basis, with the provision that no demand would be made by The Coral Gables First National Bank so long as the water and sewer contract with the City of West Palm Beach was not in default. The payments coming into the hands of the Trustee were then allocated so that a certain amount was to be paid to The Coral Gables First National Bank in order to keep the payments current on the two July, 1956, loans which were secured by a first mortgage on the equipment of Constructors. This is the first time that the July, 1956, loans were in any way connected with the November 14, 1956, loan. Sixty-five per cent of the payments received by the American Surety Company were then to be applied against the new demand note of $218,275.27, and the balance of the funds was to be available to American Surety Company and Constructors of Florida for use in completing the City of West Palm Beach contracts.

This new arrangement continued until on or about August 25, 1957, at which time the City of West Palm

Beach claimed certain breaches by Constructors of the water and sewer contracts, and attempted to take over the remaining work itself. Thereafter, The Coral Gables First National Bank, and Pan American Bank of Miami, as a participant, brought foreclosure proceedings against Constructors. It was at this time that Constructors pleaded the defense of usury.

The lower Court found that the loan transaction of November 14, 1956, was usurious; that the re-negotiated agreement of March 20, 1957, did not cure the usurious taint, and assessed damages against The Coral Gables First National Bank for double the interest received by that bank (which included the $44,240.00 which was retained by the bank as advance interest although never actually paid) and gave credit against the amount so computed for the interest credited to Constructors upon the re-negotiation on March 20, 1957. The lower Court also awarded damages against the Pan American Bank of Miami in the total sum of $265,999.27, representing the principal and interest received by both the Pan American Bank of Miami and The Coral Gables First National Bank. The Court also cancelled the remaining unpaid principal and interest, and referred to this as a "liability of both Plaintiff banks."

In addition to the above damages, the Court awarded attorneys' fees against the banks in the amount of $45,000.00 and $27,347.58 respectively. The District Court of Appeal of Florida, Third District, reversed the lower Court as to the award for attorneys' fees, and found "at the National Bank Act applied to The Coral Gables First National Bank and, therefore, the forfeiture of the principal amount would be reversed as to The Coral Gables First National Bank, and that bank could recover that percentage of the principal amount of the loan which it

had furnished. The balance of the findings of the lower Court were affirmed, including a finding by the lower Court that the plaintiff banks could not foreclose the mortgages securing the loans of July 24, 1956, and July 25, 1956, to which no defense of usury had been raised, on the theory that the banks had not come into equity with clean hands--not with respect to the two loans in question, but with respect to the subsequent transaction of November 14, 1956.

On April 14, 1961, the lower Court entered its final order and judgment on the mandate, which purported to be in conformity with the opinion of the District Court of Appeal of Florida, Third District. However, the lower Court did not follow the mandate of the District Court of Appeal and review the entire question of usury, but proceeded to enter a final judgment against The Coral Gables First National Bank in the amount of $74,867.52, with interest from July 2, 1958, and a judgment against Pan American Bank of Miami in the amount of $265,999.27, with interest from July 2, 1958. The lower Court did, however, reserve unto The Coral Gables First National Bank the sum of $11,271.20, on the theory that this represented the unpaid balance of the principal amount advanced by The Coral Gables First National Bank. However as an additional usury penalty, the lower Court held that the lien of The Coral Gables First National Bank securing the indebtedness was not enforceable, not only as to the November 14, 1956, loan transaction, but also as to the two prior chattel mortgages of July, 1956. (For copy of decree of April 14, 1961, see Appendix A37-A41, Tr. 176-186).

The lower Court then went on to inject several new features which had not been passed upon by the District Court of Appeal. First, the lower court stated that it was not determining whether the two prior loan trans-

actions of July, 1956, were in default, inasmuch as the United States District Court for the Southern District of Florida, in proceedings for the reorganization of Constructors of Florida, Inc., had assumed jurisdiction of that claim. Secondly the lower court affirmatively held that the judgments awarded to John Nicholas, as Trustee for Constructors of Florida, Inc., were not subject to off-set by reason of the claims of the banks against Constructors of Florida, Inc. Thirdly, the lower court found that the lien of American Surety Company of New York on the chattels and equipment of Constructors of Florida, Inc., in the amount of $1,367,379.19 and interest thereon, and attorneys' fees in the amount of $72,347.58, were superior to any claim of the banks.

An interlocutory appeal under the Florida Appellate Rules was immediately filed seeking the review of the decree of April 14, 1961, to the District Court of Appeal of Florida, Third District (See Appendix A42-A43, Tr. 197-198). The assignments of error in which the construction of the Federal Statute, Title 12, Sections 85 and 86, by the lower court was complained of, are shown at Appendix A44-A47, Tr. 199-202. These assignments of error squarely raise the points that the decision and final judgment upon which execution issued, by the Circuit Court of Dade County, Florida, on April 14, 1961, purporting to carry out the opinion, decision and mandate of the District Court of Appeal of Florida, Third District, resulted in a construction of the Federal Statutes which violated the plain terms and conditions of the Federal Statute as to penalties imposed and inconsistent with the opinions of this Court on the same subject matter.

F. SPECIFICATION AS TO THE STAGE OF THE PROCEEDING IN THE COURT OF THE FIRST INSTANCE AND IN THE APPELLATE COURT AT WHICH AND THE MANNER IN WHICH THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED, AND THE METHOD OF RAISING SAME.

At the time the first petition for certiorari was filed in this Court under the October Term, 1960, Cause No. 559, a certified typewritten copy of the record of the proceedings in the trial court, as well as the proceedings in the District Court of Appeal of Florida, Third District, on the first appeal, were set forth. These records reflect that in the initial pleadings in the trial court when the plea of usury was interposed by Constructors of Florida, extensive motions to dismiss the counterclaim for usury were filed, setting up the Federal Statutes, Title 12, Sections 85 and 86, U.S.C.A. The opinions and partial final decree of the trial court, to-wit, the Circuit Court of Dade County, Florida, and in particular the amended decree of July 2, 1958 (Appendix A1-A19, Tr. 1-21), reflect that the issues with reference to the construction of the Federal Statutes were raised, were considered by the lower court, and applied in such a way as to render the Federal Statutes and the construction placed thereon by this Court in a previous decision, as a nullity. When the appeal was taken from that order, the opinion of the District Court of Appeal of Florida, Third District (119 So.2d 741) reflects that under the assignments of error filed, the question of the construction of the Federal Statutes was squarely raised and squarely passed upon by the said Appellate Court. A copy of that opinion is set forth in the Appendix to this petition (Appendix A19, Tr. 230).

The same question of the erroneous construction of the Federal Statute was raised in the petition for certiorari filed in June of 1960 in the Supreme Court of the State of Florida, but that Court refused to take jurisdiction, leaving the opinion of the District Court of Appeal of Florida, Third District, as above mentioned (119 So.2d 741), as the opinion of the court of last resort.

When the new proceedings were then commenced on April 14, 1961, in the Circuit Court of Dade County, Florida, pursuant to the mandate of the District Court of Appeal of Florida, Third District, the opinions reflect that that Court acted in a summary capacity without actually conducting any new proceedings or re-trial of the issue. A petition for rehearing was filed in that Court (Tr. 182-192). Ground 2 of that petition for rehearing directed to the lower court raised the specific federal question, and pointed out that the lower court had again failed to recognize or properly construe the said Federal Statutes. That petition for rehearing was denied by the Circuit Judge and was stricken by order of the Court dated the 17th day of April, 1961 (Tr. 196).

When the interlocutory appeal was filed to review the decision of the lower court of April 14, 1961, and the order denying the petition for rehearing of April 17, 1961, as above mentioned, appeal was taken from both orders, one the final judgment and execution above mentioned dated April 14, 1961, and order striking the petition for rehearing on the 17th day of April, 1961. The assignments of error supporting that notice of appeal (Appendix A44-A47, Tr. 199-202) reflect that the Federal question was asserted in assignments of error numbers 1, 4, 6, 9, 13 and 14. As above pointed out, the District Court of Appeal of Florida, Third District, granted a motion to quash this appeal and refused

to pass upon any of the points raised, including the Federal questions raised by the assignments of error concerning the improper construction of the penalty features permitted under U.S.C.A., Title 12, Sections 85 and 86.

The same Federal questions were presented in the lengthy petition for certiorari filed with the Supreme Court of the State of Florida on the 8th day of June, 1961, copy of which was required to be filed with the District Court of Appeal of Florida, Third District, as a condition for the application to the Supreme Court of the State of Florida. This is a voluminous petition and is attached as a part of the record in this case (Tr. 231-300). However, the Supreme Court of Florida, without taking jurisdiction, denied the petition for certiorari as reflected by its final orders of July 24, 1961, rehearing denied September 26, 1961 (132 So.2d 806; 133 So.2d 319; Tr. 301-302. Appendix A49-A50).

As reflected by the above references, the Federal question was raised in every stage of the proceedings.

G. REASONS FOR GRANTING THE WRIT.

The District Court of Appeal of Florida, Third District, has decided an important and a novel Federal question in the construction of Title 12, U.S.C.A., Paragraphs 85 and 86 (which limits the right of a State Court to impose penalties for alleged usurious contract upon a National Bank doing business within the State), which is in direct conflict with the plain and unambiguous provisions of that statute, as construed by this Court in the case of *McCollum v. Hamilton National Bank of Chattanooga*, 58 S. Ct. 568, 303 U.S. 245, 82 L. Ed. 819, and many prior opinions cited therein.

As established by the doctrines of this Court in said opinion and in prior opinions referred to, a National Bank operating within the State of Florida, even if guilty of violating the Florida State Usury Laws (which is not conceded by the petitioners in this case), could only be denied in a foreclosure action in equity in the State Court the right to recovery of the amount of interest contracted for but not paid, leaving the principal sum intact and subject to foreclosure and judgment.

In the event any interest is paid which is found to be usurious or in violation of the State Usury Statutes, then under the provisions of Title 12, U.S.C.A., Paragraph 86, the statute makes this clear and unambiguous provision:

> "In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same."

In the case at bar, the highest court of Florida having jurisdiction over this subject matter has by its ruling permitted affirmative relief against the National Bank by way of set-off and counterclaim in the foreclosure action in the equity courts of Florida; not simply a denial of the right to recover the interest contracted for but unpaid, but a discharge of the principal amounts involved, together with a penalty forfeiture of the taking of security away from the National Bank on other mortgages not involved in the usury claim in excess of a value of $110,000.00.

As further grounds for granting the certiorari, the record in this case discloses that the National Bank held two chattel mortgages given by Constructors of Florida, one on the 24th of July, 1956, and one on July 25, 1956, securing separate notes, and upon which separate mort-

gages were given on separate personal property and equipment. Both of these mortgages calling for approximately $7,000.00 per month total payments were in default on September 20, 1957, when this foreclosure action was instituted on the third loan of November 14, 1956.

As part of the security for this third loan transaction, in addition to other collateral, Constructors of Florida had given a second mortgage in the nature of a blanket mortgage upon the same equipment that had been covered by the first two mortgages of July, 1956. Under the requirements of the Florida law, the plaintiff is required to foreclose all of his mortgages against the same security at the same time and in the same action, and thus these two mortgages about which there was no question of usury ever raised, were sought to be foreclosed in the same equity action. During the progress of the foreclosure, Constructors of Florida became a bankrupt, and a trustee in bankruptcy was appointed in December, 1957.

No issues were raised in the pleadings concerning the validity of the first two mortgages or the first priority lien which those mortgages created on the personal property and equipment. The opinions of the Lower Court, affirmed by the District Court of Appeal of Florida, sought to be reviewed, imposed a collateral penalty upon the National Bank by cancelling the first mortgage lien which the National Bank held against the personal property, machinery and equipment of the two July mortgages, citing as the only reason therefor that the National Bank had come into equity with unclean hands. This resulted in a loss to the Bank of its first mortgage on equipment which was worth the amount of the unpaid balances on the first two mortgages, and deprived the National Bank of its opportunity and contractual right to be satisfied as to those first two mortgages out of the collateral security at a time

when the maker of the note was in bankruptcy and totally insolvent as far as the general creditors' claims were concerned. This amounted to depriving the petitioners of a valuable property right without due process of law or compensation.

These actions collectively, not only violated the provisions of the 5th and 14th Amendments of the Constitution of the United States for protection of the petitioners under those amendments, but were a clear and clean-cut violation of Title 12, U.S.C.A., Paragraph 86.

The case of *McCollum* v. *Hamilton National Bank of Chattanooga*, 303 U.S. 245, 58 S. Ct. 568, 82 L. Ed. 819, decided in 1938, was the last expression by this Court upon the issues involved in this case. That decision has been the recognized authority controlling the operation and management of National Banks ever since. This decision of the Supreme Court of the United States has since been recognized by the Court of Appeals of the Sixth Circuit in the case of *Schumacher* v. *Lawrence*, 108 F.2d 576, a 1940 decision, in which that Court reiterated and applied to a similar case the principles laid down by this Court in the *McCollum* decision. Under the *Schumacher* decision and construing this Court's opinion in the *McCollum* case, the Court of Appeals for the Sixth Circuit again applied the Federal doctrine holding that under the Federal Statute 12, U.S.C.A., 86, usurious interest which has been paid to a National Bank must be recovered back in an independent action, which remedy is exclusive since the Federal Statute controls, and again quoted from the *McCollum* case as holding (577):

> "'One paying a national bank usurious interest and entitled to enforce the penalty may not recover it by way of set-off in a suit brought upon his note to the bank.'"

It was also held in the *Schumacher* case that where a National Bank brought a foreclosure action in a State Court (in Michigan), any claim for interest paid under a usurious loan could not be set off in the mortgage foreclosure suit.

The usury penalty invoked in this case in the defense and counterclaim was not restricted as against the National Bank to double the amount of the interest actually paid, which would have been only a nominal amount and was not restricted to a denial to the Bank of its right to collect interest contracted for, but not paid, but concluded in a judgment against the National Bank forfeiting an amount in excess of the principal of the note, together with collateral damages of over $110,000.00 penalty on other issues and other securities held by the Bank, purely as punitive penalties. This decision by the District Court of Appeal of Florida flaunts the Federal Statute, flaunts the long series of opinions by this Court, and if allowed to stand, would create a precedent that would be disastrous to National Banking interests throughout the United States, and particularly in the State of Florida.

H. ARGUMENT.

POINT 1.

Has the District Court of Appeal of Florida, Third District, in Its Opinion of March 22, 1960, Effective September 19, 1960, As Interpreted and Finalized by the Order on the Mandate Entered on April 14, 1961, and As Re-Construed by the District Court of Appeal of Florida, Third District, by Its Opinion Quashing the Interlocutory Appeal Dated May 25, 1961, Petition for Certiorari and Rehearing Thereon Denied by the Supreme Court of Florida September 26, 1961, Violated the Specific Provisions of United States Statute, Title 12, U.S.C.A., Paragraph 86, in Allowing Excessive Counterclaims and Set-Offs and Penalties Not Authorized under Said Statute?

The United States Statute reflected in Title 12, Paragraph 86, must be read in relationship to Paragraph 85 which just precedes it. Paragraph 85 in general provides that any National Bank may:

> "take, receive, reserve, and charge on any loan or discount made * * * interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve District where the bank is located, which ever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. * * *."

In Florida, the rate of interest fixed on loans to corporations is covered in Section 687.03, as shown in the 1955 Florida Statute.

Prior to 1953, a corporation under the Florida law was prohibited from pleading usury. This law was amended, effective October 1, 1953, and that law was in November, 1956, as follows:

> "Section 687.03. Unlawful rates of interest defined; proviso.—It shall be usury and unlawful for any person, or for any agent, officer or other representative of any person, to reserve, charge or take for any loan, or for any advance of money, or for forbearance to enforce the collection of any sum of money, except upon an obligation of a corporation, a rate of interest greater than ten per cent per annum, either directly or indirectly, by way of commission for advances, discounts, exchange, or by any contract, contrivance or device whatever, whereby the debtor is required or obligated to pay a sum of money greater than the actual principal sum received, together with interest at the rate of ten per cent; and *such transactions with a corporation shall, whereby the corporation pays interest, be usury and unlawful if for a rate of interest greater than fifteen per cent per annum. The provisions of this section shall not apply to sales of bonds in excess of one hundred dollars and mortgages securing the same, or money loaned on bonds.*"

The penalty for one class of usury under the Florida law is set forth in Section 687.04, as follows:

> "Penalty for usury; not to apply to transferee of negotiable paper unless usury appears on face.—Any person, or any agent, officer or other representative of any person, willfully violating the provisions of Section 687.03 shall forfeit the entire interest so charged, or contracted to be charged or reserved, and only the actual principal sum of such usurious contract can be enforced in any court in this state, either at law or in equity; and when said usurious interest is taken or reserved, or has been paid, then and in that event the person, who has taken or reserved, or

has been paid, either directly or indirectly, such usurious interest, shall forfeit to the party from whom such usurious interest has been reserved, taken or exacted in any way, double the amount of interest so reserved, taken or exacted; * * *."

Where the interest is alleged to be in excess of 25%, then Section 687.07 applies, which is as follows:

"Forfeiture and penalty in case of excessive interest or charges.—Any person, or the agent, officer or other representative of any person, lending money in this state who shall willfully and knowingly charge or accept any sum of money greater than the sum of money loaned, and an additional sum of money equal to twenty-five per cent per annum upon the principal sum loaned, by any contract, contrivance or device whatever, directly or indirectly, by way of commissions, discount, exchange, interest, pretended sale of any article, assignment of salary or wages, inspection fees or other fees or otherwise, or for forbearing to enforce the collection of such moneys or otherwise, shall forfeit the entire sum, both the principal and interest, to the party charged such usurious interest, and shall be deemed guilty of a misdemeanor, and on conviction, be fined not more than one hundred dollars, or be imprisoned in the county jail not more than ninety days."

Under the Florida law as above set forth, if there is usury in a normal loan transaction in Florida, or where a State Bank is directly involved and is a primary lender, there are three classifications:

(1) If the usury is above the legal rate as far as a corporation is concerned of 15% per annum and under 25%, the interest contracted for shall be forfeited and only the principal amount may be collected.

(2) If the interest has been paid or reserved in such a way as to be the equivalent of payment, then that amount

so paid may be recovered back in a sum double the amount, that is to say, the actual interest paid and a one time penalty. If $1,000 has been paid, then the total recovery would be $2,000, with the principal intact.

(3) If, on the other hand, the interest is computed and found to be in excess of 25%, then Section 687.07 applies, and if it shall be established that the lender has wilfully and knowingly charged or accepted any sum of money greater than the sum of money loaned, and an additional sum of money equal to 25% per annum, etc., the lender shall forfeit to the party charged such usurious interest, the entire sum, both principal and interest. In that event, even though interest has been paid, the amount paid is not doubled. See *Rosenblum* v. *Hart*, 95 So.2d 18.

Interest which is simply contracted for in advance, such as the discount involved in this case, is not under the Florida law interest paid or reserved. See *Wenck* v. *Insurance Agents Finance Corporation*, 99 So.2d, 883, and as interpreted also by a recent decision of the United States Court of Appeals, Fifth Circuit, Case No. 18071, *Conner Air Lines, Inc., and F. A. Conner, Appellants*, v. *Aviation Credit Corporation et al., Appellees*, Opinion rendered June 30, 1960, 280 F.2d 895, petition for certiorari denied, 81 S. Ct. 274.

This case involved other issues, but in the body of that opinion as printed and issued by the United States Court of Appeals, Fifth Circuit, in construing the two Florida Statutes, 687.03 and 687.04, that Court said:

> "If there was not any payment, or any taking or reserving of usurious interest, then the full amount of the principal, without interest, may be recovered."

quoting *Wilson* v. *Conner*, 106 Fla. 6, 142 So. 606; *Ross* v. *Atlas Finance Corporation*, 113 Fla. 793, 152 So. 410; *McGillick* v. *Chapman*, 134 Fla. 220, 184 So. 26.

Then, further quoting from said opinion, that Court said:

> "The provision for the forfeiture of double the amount of the interest exists only if the usurious interest has been paid or has been taken or reserved. Certainly Conner did not pay the so-called bonus to Aviation Credit. Was it otherwise paid, taken or reserved? It was not, unless it can be said that a paying, taking or reserving resulted from the transfer of the amount of the bonus from Aviation Credit to Smith Aircraft. The undertaking of Conner to pay Aviation Credit the $33,310.18 constituted usury, but only because of the relationship between the two Smith corporations. By reason of that same relationship we are precluded from saying that the transfer by one of them to the other is the paying, taking or reserving of the usurious bonus."

The doctrine of that case, quoting the Supreme Court of Florida decisions, is exactly the same doctrine as laid down by the District Court of Appeal of Florida, Third District, in the case of *Wenck* v. *Insurance Agents Finance Corp.*, 99 So.2d 883, above mentioned.

So that in the case at bar, there was no taking of payment of any interest up to March 7, 1957, except $5,615.44. Thereafter by the contract of March 20, 1957, a new note was entered into on a straight 15% rate on unpaid principal balances. Even under that concept, there was an additional interest paid on the new note of March 20, 1957, of $5,370.35 (119 So.2d 741, 745). So that from the beginning of the loan of November 14, 1956, until all parties ceased making payments in June of 1957, the total amount of interest actually paid either under the November 14, 1956 arrangement or the March 20, 1957, arrangement, was $10,985.79.

If a separate suit had been filed by Constructors of Florida or its Trustee in Bankruptcy, and if all issues

had been determined against the Coral Gables First National Bank, the total recovery would have been twice that amount of money. In addition to that, of course if there was any unpaid interest contracted for but not paid, that amount and that amount only, could have been offset in the foreclosure action.

The computations contained in the opinion of the District Court of Appeal of Florida, Third District (119 So.2d 745), are utterly confused and provide for at least three times the amount of interest that could be charged under any concept of the Florida law.

In the case of *McCollum* v. *Hamilton National Bank of Chattanooga*, 303 U.S. 245, 58 S. Ct. 568, a very similar situation was involved. This case was heard on writ of certiorari to the Supreme Court of the State of Tennessee. McCollum was the Trustee in Bankruptcy of Lookout Planing Mills. He brought a suit in the chancery court of Hamilton County, Tennessee, to recover from the Hamilton National Bank of Chattanooga, but he confined his suit to a claim under Federal Statute, 12 U.S.C.A., Paragraphs 85 and 86. The State Court followed that statute but after finding that the bank had received $5,235.55 in interest which was usurious under the Tennessee law, gave a judgment against the bank for double that amount. At that time there was still $25,493.70 left on notes, and the State Court permitted a set-off, simply crediting twice $5,235.55 as against the total claim for approximately $25,000.

This Court reversed the Lower Court on the question of set-off, but in the body of the opinion this Court laid down certain definite rules in which it said (570):

> "The penalty is to be enforced according to the terms of the statute. Guilt being established, the law itself fixes the punishment at precisely twice the usurious exaction paid; it may not be enhanced or mitigated be-

> cause of aggravating circumstances or equitable considerations. As the sum demanded is certain, recovery in an action of debt is authorized, though the claim arises not in contract but in tort. * * * The liability can only be enforced in an action 'brought specially and exclusively for that purpose—where the sole issue is the guilt or innocence of the accused, without the presence of any extraneous facts which might confuse the case.' Barnet v. National Bank, 98 U.S. 555, 559, 25 L. Ed. 212. One paying a national bank usurious interest and entitled to enforce the penalty may not recover it by way of set-off in a suit brought upon his note to the bank. Haseltine v. Central Bank of Springfield, 183 U.S. 132, 137, 22 S. Ct. 50, 46 L. Ed. 118; * * *"

Then the Court said (570):

> "The right of set-off here involved does not at all depend upon the Tennessee statute upon which, at least in part, the state supreme court rested its ruling."

Then the Court said (571):

> "Liability for the penalty does not arise in contract but is laid in invitum as a disciplinary measure. * * * As the penalty may be enforced only in a suit brought exclusively for that purpose so that the trial of guilt or innocence may not be embarrassed by any other question, it is plain that the payment of any debt owed by the plaintiff to the bank may not be held a condition precedent to the determination of that issue. Punishment for usury does not depend upon payment of the borrower's debt."

The case was reversed.

Prior thereto, in a long line of decisions, this Court has established the doctrine that while the Federal law permits certain suits affecting National Banks to be tried in the coordinating State Courts, yet that power is restricted to the right of the State Court to enforce the provisions of

the Federal Statute, irrespective of any State laws. See *Farmers & Mechanics National Bank* v. *Dearing*, 91 U.S. 29, 23 L. Ed. 196, in which this Court said:

> "The national banks organized under the Act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them, Congress is the sole judge.
>
> Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in anywise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single State cannot give.' Against the national will 'the States have no power, by taxation or otherwise, to retard, impede, burthen or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government.'"

In many other cases which we will simply mention, this Court has taken jurisdiction either by writ of error under the old procedure, or by writ of certiorari under the general procedure to review and to reverse the decisions of State Courts when the State Courts have gone beyond the restrictions in the Federal Statute. See *Brown* v. *Marion National Bank of Lebanon*, Kentucky, 169 U.S. 416, 18 S. Ct. 390. *First National Bank of Jacksboro* v. *Lasater*, 196 U.S. 115, 25 S. Ct. 206. *Talbot* v. *First National Bank of Sioux City*, Iowa, 22 S. Ct. 612, 185 U.S. 172.

There is one statement from this opinion which is pertinent, in which the Court said:

> "The denial by a state court of a right of action expressly based on an act of Congress presents a Federal question which gives the Supreme Court of the United

States jurisdiction to review a decision of such state court."

Further in the body of the opinion, this Court said (p. 616):

"Two cases are provided for (1) where illegal interest has been taken, received, or charged; (2) where illegal interest has been paid. In the first case the entire interest which the 'evidence of debt carries with it' shall be deemed forfeited. In the second case the person who has paid 'the greater rate of interest may recover twice the amount of interest thus paid.'"

In a later case, this Court passed upon the same subject in reversing the Supreme Court of South Dakota—*Patrick B. McCarthy* v. *First National Bank of Rapid City*, South Dakota, 32 S. Ct. 240, 223 U.S. 493.

POINT 2.

Has the District Court of Appeal of Florida, Third District, in Its Opinion and Mandate of March 22, 1960, Effective September 19, 1960, As Interpreted and Finalized by the Order on the Mandate Entered on April 14, 1961, and As Reconstructed by the District Court of Appeal of Florida, Third District, by Its Opinion Quashing the Interlocutory Appeal Dated May 25, 1961, Petition for Certiorari and Rehearing Thereon Denied by the Supreme Court of Florida, September 26, 1961, So Construed the Effect and Operation of the United States Statute, U.S.C.A., Title 12, Paragraphs 85 and 86, Limiting the Amount of Allowance of Usury Penalty Against a National Bank, in Such a Way As to Make It Void and Inoperative for All Practical Purposes?

In the statement of the case we have clearly pointed out that the Florida Courts, as set forth in the opinion by the District Court of Appeal of Florida, Third District,

while recognizing that a Federal Statute exists, completely ignored the effect of that statute by attempting to say that when the National Bank loaned $442,400 on November 14, 1956, and charged as advance interest $44,240, that that was interest paid. That was in violation of the Federal Statute.

If the State Court had simply denied the right of the National Bank to collect the $44,240, or denied it the right to collect an additional 5% for the period of time the loan was in force and effect, this case would have presented a different question. But the Court attempted to double that amount, claiming that there had been $99,710.88 penalty and double the interest collected subsequent to March 20, 1957, of $10,740.70, making a total of double the interest paid of $110,451.78.

The schedule as shown in the reported opinion (119 So.2d 741, 745) contains a figure as the liability of the Coral Gables First National Bank. Then the Court gave a credit termed:

> "Less' amount credited to principal on renegotiation $35,584.06."

or a total of alleged recovery for interest paid, or double the amount of the interest paid, less credits, of $74,867.52. This claim was not based simply upon forbearance, because admitting $35,584.06 credit as against the original $44,240 interest taken in advance, there could only have been an amount of interest of the difference, or about $9,000, which would come under the classification of interest contracted for, but not paid.

Applying the Federal Statute, and if there was usury, the State Court might have been within its rights to have permitted the National Bank to collect some $400,000 of

principal, but denied its right to collect the contractual balance of some $9,000. That is the only result that could have been reached by the State Court consistent with the Federal Statute. During that interim, taking an over-all figure of an additional $11,000 interest actually paid, that amount could only have been collected, not by offset or counterclaim in the equity foreclosure action, but must be the subject matter of a separate and distinct action under the *McCollum* decision.

In addition to this glaring error in conflict with the Federal Statute, we have heretofore pointed out in the statement of the case that the State Court caused a forfeiture of approximately $110,000 in value of collateral to the two mortgages of July 24 and 25, 1956, respectively, and decreed that the National Bank would forfeit or lose all of its principal claim, balance due of $151,802.46, with the exception of 7% thereof, or an additional collateral penalty of approximately $140,000.

In addition to those penalties, the State Bank, which only had a trust interest participation of $243,000, approximately, out of the $442,400, was decreed to be liable:

For the return of principal and interest paid to March 20, 1957	$194,156.11
For principal paid subsequent to March 20, 1957	66,472.81
Interest paid subsequent to March 20, 1957	5,370.35
Or a total of	$265,999.27,

apparently upon the theory that the Pan American Bank's subsequent participation amounted to 92% of $263,000, which figure was drawn out of the thin air.

These payments are duplications, because there was never any money paid by Constructors of Florida to the Pan American Bank. All payments were paid to and handled in the name of and by the Coral Gables First National Bank. These items are double charges of erroneous figures from the inception.

We can only demonstrate the complete error by pointing out by reference to the computations in 119 So.2d 745, that counting the item of liability to Pan American Bank of principal and interest paid to March 20, 1957, as $194,156.11, and deducting therefrom the gross interest paid on the whole contract of $5,615.44, that would be a net yield of principal repayment to Pan American Bank of $188,540.67. Adding the next item of principal alleged to have been paid to Pan American Bank after March 20, 1957—$66,472.81, to the item of $188,540.67, would result in a total of $255,013.48 principal repaid to the Pan American Bank, when they did not advance on the interim certificate of November 28, 1956, but $243,000.

In addition to these erratic figures, the Court then cancelled the balance of $151,802.46 principal and interest in addition thereto, making a total of $172,585.29 cancelled.

POINT 3.

Where the Federal Statute Covering Allowable Usury Penalties Against a National Bank under the Provisions of U.S.C.A., Title 12, Paragraph 86, Is Restricted to a Defense in an Action to Enforce the Debt, to a Forfeiture of the Interest Unpaid but Contracted for, Without Any Invasion of the Principal Amount Due, or Where in the Event Any Usurious Interest Is Actually Paid, to a Separate Suit by the One Making the Payment for Double the Amount of the Interest Actually Paid, May a State Court upon Alleged Equitable Grounds by Way of Penal or Compensatory Damages, Impose Collateral Damages and Penalties Against a National Bank in Excess of the Total Amount of the Principal Involved in the Transaction?

There are certain portions of the argument directed to the first two points which are directly applicable to questions raised under Point 3. We will not reiterate all of those arguments, but we will adopt that portion in Points 1 and 2 which is applicable to the first phase of Point 3.

The specific difference in Point 3 is the fact that the State Court in the opinions appealed from has adopted some new and unheard of doctrine of granting punishment against a National Bank unheard of in the State practice, not applicable to State Banks or other lenders of moneys in the State of Florida. We have covered the technical phases of the Usury Statutes of Florida, and a casual examination of the provisions of Title 12, U.S.C., Section 86, will demonstrate that even under that statute the computation of penalties is exorbitant and clearly violative of the spirit and letter of that Federal Statute. Other phases, however, which are not so apparent on the surface, upon analysis have an effect that is even more shocking.

The National Bank, as demonstrated from this record, had had a long period of dealing with Constructors of Florida. In July, 1956, the National Bank had financed Constructors of Florida on the two mortgages which we have heretofore described. Chattel mortgages granting admitted first lien upon the equipment were given to secure that debt, as evidenced by the two mortgages. The contract with the City of West Palm Beach was not even in existence in July, 1956. The contract performance bond, wherein the American Surety Company bonded Constructors of Florida on the West Palm Beach Sewer Job, was dated August 29, 1956 (Tr.). This was well over one month after the chattel mortgages of July 24 and 25, 1956, respectively, had been executed and recorded in the Public Records of Dade County, Florida.

After that bond had been executed by the American Surety Company on behalf of Constructors of Florida, Constructors borrowed $60,000 in the first part of October, 1956, from the National Bank, and an agreement was worked out whereby the City of West Palm Beach, in order to secure the National Bank on that loan, agreed to send all the checks which would be due to Constructors of Florida, to the Coral Gables First National Bank. This was pursuant to a resolution of the board of directors of Constructors of Florida (Tr.).

In these prior transactions, running over a period of months, Pan American Bank of Miami was not a party in privity with Constructors of Florida or with the American Surety Company. We do not question that over a period of years these banks, as well as many other banks, had interchanged trust receipts or certificates in the nature of participation certificates, but these were matters solely controlled by contracts between the parties, that is to say, the banks involved, and these inter-company transactions

had nothing to do with the primary handling of these deals by the National Bank.

When the loan of November 14, 1956, the one now in question, was made, copies of these papers were all sent to the Surety Company. Their attorney-in-fact, Mr. Harold S. Flagg, with full knowledge of all the transactions, subordinated the claim of the Surety Company. The Surety Company at that time had no mortgage and had no type of assignment or contract from Constructors of Florida which could have in any way been deemed to have been prior to the mortgages held by the National Bank executed and recorded in July, 1956. Without, however, waiting for the consent of the Surety, or even the consent of the City of West Palm Beach, the National Bank in good faith made the loan of November 14, 1956, took the agreement of Constructors of Florida as to the assignment of the proceeds of the West Palm Beach contract, and advanced some $400,000, out of which the $60,000 loan was repaid.

The Coral Gables First National Bank did not attempt to participate the Pan American Bank until it had received the letter of November 27, 1956, from the Surety Company (Tr. 26-29). It continued to make payments out of Constructors of Florida Collateral Account No. 1 until over half of that account had been disbursed at the request of Constructors of Florida. When the final formal consent to the assignment was received on January 2, 1957, from the City of West Palm Beach, the balance of that account, totaling as we have before set forth, $135,597.62 over-all, was finally distributed by January 7, 1957.

On November 14, 1956, there was no certainty as to the time when payment of funds would be forthcoming from the City of West Palm Beach contract. Those checks

which were subsequently received prior to January 2, 1957, were represented by checks payable to Constructors of Florida and simply deposited with their knowledge and consent in their bank account, at the Coral Gables First National Bank, called Constructors of Florida, Inc., Collateral Account No. 2.

As we have heretofore pointed out, some substitution of collateral was permitted by agreement, and under the terms of the note and mortgage contract itself of November 14, 1956, Constructors had the right to substitute acceptable collateral in lieu of the cash payments coming in. The Bank could not have used that money. The title to that money was in Constructors of Florida, simply with a hold order requiring the approval of a bank officer before those funds could be converted to other collateral.

On March 4, 1957, when Constructors of Florida was in financial difficulty, not on the West Palm Beach job, but on other of its contracts, the President of that corporation, as we have heretofore pointed out, directed a letter in which for the first time they asked for a distribution of $50,000 from the funds on hand in the controlled account. At that time the National Bank still holding the first two mortgages of July, 1956, found that those mortgages were in default for failure to make the February payments, and the National Bank called the loan, as it had a right to do. It could have immediately foreclosed for the balance after the application of approximately $179,000.

The Surety Company, which was then involved under its commitments on other contracts, as well as commitments on the West Palm Beach contract, joined with Constructors of Florida in arranging a new program which would yield a possibility of some current funds for their operations. The American Surety Company could not

claim usury in the contract and did not at that time make any contention as to usury. Neither did Constructors of Florida. Under these circumstances, the contract of March 20, 1957, was renegotiated, in which the Surety Company, as well as Constructors of Florida, confirmed the prior position of the National Bank on all of its mortgages, being three in number.

The Appellate Court decision affirmed the findings of the Lower Court that while that contract had been made, it was void. This was the first time in Florida that any court has ever held that a contract itself was void because of a usury implication. Certainly the parties had a right to contract. Certainly the American Surety Company had a right to enter into that contract and confirm its inferior position. Certainly all the parties had a right to contract with reference to the handling of the proceeds from the West Palm Beach contract.

Whether that contract clarified the former alleged usury is not the question. The Florida Court voided the contract, which was a clear violation not only of the protection of the United States Constitution on the right of parties to contract, but the voiding of that contract in favor of the American Surety Company and its subordinating of its alleged lien protection, was the taking of a valuable property right of the National Bank and was the collateral infliction of an additional penalty for usury prohibited by the Federal Statute.

If the Florida Court had upheld the validity of the contract and simply held that the usury penalties of the State law would still be applicable to that contract, then we would have a different situation. The Florida Court was not content with doing that, but it voided the contract in its entirety, even though the original note of November

14, 1956, was cancelled and an entirely new note in the amount of $218,000 approximately was issued under different terms, different security arrangements and with different parties involved in the contract. That was a collateral penalty not authorized or permitted under the Federal Statutes or even under the State Statutes.

In addition to that forfeiture, and in addition to the complete cancellation of the National Bank's position as a first mortgagee under the notes and mortgages of July, 1956, the Appellate Court decision completely ignored the fact that the $135,597.62 represented by the funds which were originally deposited in Collateral Account No. 1 on November 14, 1956, had actually been paid to and used by Constructors of Florida. That money has been lost. It is obvious that the National Bank did not make available to or for the use and benefit of Constructors of Florida, $263,000. It actually, from its funds, gave to Constructors of Florida $400,000. If the Florida Court had given recognition to the fact that the principal amount of $400,000 had been given to Constructors of Florida instead of $263,000, then there would have been no usury in the contract of November 14, 1956, even under the admitted decision of the Appellate Court applying other Florida decisions.

What happened to the $135,597.62? The Appellate Court of Florida simply wiped that amount out of any consideration, and this is a clear-cut penalty violation in which the Florida Court must have forfeited that money also. How could the Florida Court forfeit $135,597.62, forfeit $110,000 worth of prime prior security on the two mortgages of July, 1956, and also void the contract of March 20, 1957, in relationship to the American Surety Company and its subordination? These are all penalties in the nature of equitable punishment against the National Bank which find no precedent in the Federal decisions or

in the State Court decisions. If the Florida Court in this computation had given consideration to that sum of $135,597.62, then there would have been no usury in the first place. How, then, can such a procedure be justified in the face of decisions of this Court and the clear mandates provided by the Federal Statute, 12 U.S.C.A. 86?

We have heretofore pointed out that under the Florida decisions of *Shorr* v. *Skafte*, Florida Supreme Court decision, 90 So.2d 604, *Clark* v. *Grey*, 132 So. 832 and *Carter* v. *Leon Loan & Finance Company*, 146 So. 664, the new contract under the Florida law was free of usury, if there had been any usury in the first place. The Lower Court had based its conclusion as to usury in the initial contract by recognizing that some $400,000 had been advanced by the National Bank in the first instance, but attempted to create a usury violation by the fact that the Bank had called the loan before its maturity date. In doing this, the Lower Court utterly ignored the contractual provisions contained in the note of November 14, 1956, which required, by contract, that the National Bank would refund or rebate or prorate any interest paid in advance in such event. So that there was never any contract by which the National Bank could have sued for or collected any usurious interest in the event of acceleration, nor was there any interest paid which was in violation of the Usury Statutes.

The higher court, District Court of Appeal of Florida, Third District, not basing its opinion on the same theory upon which the Lower Court opinion was based, simply ignored the fact that $400,000 had been paid by the National Bank, and reconverted the loan to $263,000. Then it held that since the State Bank by its subsequent trust participation had on or after November 28, 1956, paid to the National Bank $243,000, that they became the actual own-

ers of 93% of the total loan and that the National Bank only had 7%, or the difference between $243,000 and $263,000.

Again we ask, what happened to the $135,597.62? This sum cannot be found in the computation and final conclusions and orders of the Appellate Court. Not only is this a violation of the fundamental constitutional protection, but it is an additional penalty strictly in violation of the Federal Statute, Title 12, U.S.C.A. 86.

POINT 4.

May a State Court, in Addition to Allowing Interest Penalties and Forfeiture of the Amount of the Principal (All in Excess of the Original Amount of the Loan from the National Bank), Impose Additional Penalties by Way of Punitive or Exemplary Damages by Forfeiting Other Collateral Which the Bank Holds, Because It Is Claimed That the National Bank Came into a State Court of Equity Without Clean Hands?

In our arguments in support of Point 3, we have covered most of the issues presented in Point 4, with one exception. That lies in the fact that after the March 20, 1957, tri-party agreement in which the Surety Company had joined, the National Bank changed its position, waived its right to foreclose for then existing breaches in the first two mortgages, changed its distribution of the collateral to be received from the West Palm Beach contract, and operated under that new arrangement for approximately two months. In that two months period approximately $100,000 additional funds had been received from the City of West Palm Beach from March 20 up until the early part of June, 1957, and distribution had been made in accordance with the March 20, 1957, agreement.

Then the American Surety Company, Constructors of Florida and City of West Palm Beach, directly in violation of the conditions of the March 20, 1957, agreement, diverted all funds coming due from that contract, which funds would have been more than sufficient to have paid off and discharged the National Bank's claims against Constructors of Florida. The Surety Company was responsible for the completion of the West Palm Beach contracts. It had subordinated its position to that of the National Bank, and yet the Appellate Court, in voiding the agreement of March 20, 1957, held that the Bank's priority position, as far as the American Surety Company was concerned, was ineffective, and placed its stamp of approval upon the assignment or diversion of the Bank's trust fund securities from the West Palm Beach contract to the direct benefit of the American Surety Company.

The Appellate Court, in addition to all of the other penalties which had been inflicted upon the National Bank, as we have heretofore pointed out, in conflict with Title 12, U.S.C., Paragraph 86, approved the confiscation of valuable trust and security rights of the Bank.

So that as the opinion now stands, even though this Court would reverse the statutory usury penalties, as fixed by the Florida Appellate Court, and grant to the National Bank its full right to recover its principal of some $400,000, we find that Constructors of Florida is hopelessly insolvent, in bankruptcy, and there is no fund now in existence out of which the Bank could satisfy its claim. That is a further so-called equitable punishment which results in defrauding the National Bank and its depositors and stockholders, for the benefit of the American Surety Company.

That phase results in one of the most drastic penalties that could be conceived. The entire National Bank system

in the State of Florida would be wrecked, and the control by Congress of a National Bank under its protective statutes would be flaunted, ignored and reduced to absurdity. The Lower Court and the Appellate Court cited no authorities for such a drastic forfeiture, and there are no authorities in the State of Florida or within the realm of the decisions of this Court which support such a forfeiture.

POINT 5.

Where, After a Loan Has Been Consummated by a National Bank to a Corporation, and Where the Privity of Contract Is Solely Between the National Bank and the Corporate Borrower, and Where Several Weeks After the Loan Is Consummated the National Bank, Pursuant to Its General Banking Practice under the Federal Reserve System, Grants a Simple Trust Receipt or Participation for a Part of This Loan on a Straight Simple 5% Interest Participation, Does That Subsequent Transaction with the State Bank Relate the Whole Transaction from the Inception As a Co-Adventure or Joint Adventure or Agency Contract So As to Avoid the Direct Application of the Federal Statute on Usury, and Bring into Play the State Penalties Applicable Only to a State Bank?

This point necessarily involves some of the same factors discussed in the argument on the previous points. But in addition, it raises one specific point upon which we will comment. That is the effect upon the Federal Statute where a National Bank, after a loan has been consummated with a borrower, grants a trust certificate either to a State or Federal Bank, or even to some individual.

The National Bank in making this loan of November 14, 1956, was subject to the rules of the Federal Reserve

Act and the rules of the Comptroller of Currency under the National Banking Act. Under the rules of the National Banking Act reflected in Title 12, U.S.C.A., Sections 1 and 21, there was vested in the Comptroller of Currency the power to make rules and regulations. Under this authority, the Comptroller had issued his opinion #9530, which was in force and effect at the time this loan was made on November 14, 1956, in which it was provided as follows:

> "There is no legal prohibition against a national bank making a loan in periodic installments instead of in a single lump sum, although the latter is the usual practice. Likewise, it is not illegal to accomplish the same end by placing the entire amount of a loan in a special account out of which the borrower may make limited periodic withdrawals.
>
> However, under the latter arrangement the bank must be careful that the total charges imposed upon the borrower (whether such charges are described as 'interest,' 'service charges', or otherwise) do not exceed the legal rate of interest. * * *"

When the National Bank made this loan on November 14, 1956, it was acting solely and clearly within the purview of the Federal Banking Statutes and the Comptroller's rulings. Some $263,000 was immediately given to the credit of the borrower. Simultaneously, $135,597.62 was placed in the name of Constructors of Florida, Inc., the borrower. The title to the money was in the borrower, and there was simply a control provision for disbursement of that sum awaiting the receipt of the formal assignment documents. However, without waiting for this assignment document, which did not reach the Bank until January 2, 1957, the Bank had in good faith, at the request of the borrower, advanced approximately 50% of that amount, and on January 7, 1957, paid out the entire bal-

ance. Whether interest was charged by the Bank on those additional sums or not would make no difference in the usury computation. If the Bank had the right to charge interest on the funds in Collateral Account No. 1, interest computed over the life of the loan of two years was only 11.2%. If it would not be permitted to charge interest until all the funds had actually been paid out, then, taking into consideration that there were two installment payments made out of that account in November and December, 1956, and interest only computed from the date the money actually left the account, the Bank would have charged unauthorized interest amounting to less than one-half of 1% on the over-all loan.

So, whether the interest charged was 11.2% or 12%, or some figure in between, would have no bearing upon the question of usury, since the Florida Usury Statute permitted an over-all interest charge against a corporation loan of 15% per annum.

Participations, either whole or in part, are a standard practice of all members of the Federal Reserve System. These participations are in the nature of a re-discount, totally or partially, except that the holder of the participation certificate does not take any legal title to the securities or to the basic note. They may be dealt with by private contract on such terms and conditions as the two contracting Banks may agree upon. The only provision under the Federal Law and the Comptroller of Currency Rulings is that contained in Ruling or Regulation 1135A. We copy this in full at this point for the convenience of the Court.

"1135A. Sale of loan participations to other banks on a 'last in-first out' basis

The sale of a participation in a loan to another bank (usually the sale of the 'overline' or legally ex-

cessive portion of a loan) under an arrangement whereby the placed portion of the debt must first be extinguished subordinates the interest of the selling bank. It is unsound to place the selling bank in a position whereby any loss that may occur on the entire loan up to the amount of the selling bank's participation must be borne by it, and in 'overline' participations the intent and purpose of R.S. 5200 would be nullified under an agreement having this effect. To avoid this possibility, participation arrangements giving to one of the participating banks an earlier maturity or preference with respect to payment of the obligation(s) in the regular course of business, should provide that in the event of default (interest and/or principal payments past due and unpaid for such period as the participants may by agreement determine) on the loan, the appointment of a receiver, or bankruptcy of the borrower, the participating banks shall share in all subsequent loan payments and collections, in proportion to the percentage of participation held by each bank at the time of the default, the appointment of a receiver, or bankruptcy. With respect to participations in real estate loans see Paragraph 2715."

It can be seen from the application of this ruling that the so-called participant, who has taken the overline or legally excessive portion of the loan, does not have any legal title to the original note or the security pledged therefor, but that under this regulation, until a default occurs, the Banks are free to deal among themselves without regard to the maker of the original note held by the National Bank. The regulation simply provides that where the payments are past due and unpaid, or where there is an appointment of a receiver or a bankruptcy of the borrower, the participating Banks shall share in all subsequent loan payments and collections in proportion to the percentage of participation held by each Bank at the time

of the default, the appointment of a receiver or bankruptcy.

It was because of this one provision of the National Banking Law and Comptroller's Rulings that the Pan American Bank of Miami, a State Bank, was even made a proper party to the foreclosure action. It had no privity of contract with Constructors of Florida, City of West Palm Beach or the American Surety Company.

The State Court in its opinion has created an entirely new concept of the legal position of a subsequent participant with a National Bank. It finds no foundation in any reported decisions and is in dead conflict with the Federal Statutes and the Rulings of the Comptroller of Currency. The agreement of Pan American Bank in its participation was not on the terms of sharing pro rata in the deal or contract with the National Bank. It was not a party to the original contract. It never could share in any of the interest accumulations or contracts of the National Bank with the borrower. It could never hope to recover more than $243,000, plus interest at 5%. There was no provision whereby any of the interest to be received from Constructors of Florida was ever to be transferred on a pro rata basis, nor was there any agreement in that participation certificate whereby the National Bank ever legally assigned or even equitably assigned any of the direct payments made by Constructors of Florida or the City of West Palm Beach. No part of that collateral consisting of funds from the City of West Palm Beach or the second lien on the equipment, was ever assigned to the Pan American Bank. There was no agency and not one iota of testimony produced in this record to show any antitipatory agreements or understandings between the Pan American Bank, as a State Bank, and the Coral Gables First National Bank, on No-

vember 14, 1956, at the time the loan was consummated between the National Bank and the borrower.

These two Banks were free to deal with themselves and between themselves. The Coral Gables First National Bank under the Federal Regulations could have participated the balance of the 45% to other banks, either State or National, have paid those participants whatever interest it agreed to pay, and could have kept the benefit of any overage interest. That was a matter with which the maker of the note had no concern. It is a standard line of banking practice, and to apply the rule of equitable penalties, equitable damages, such as applied by the Appellate Court of Florida in this case would shatter the method of doing business under the Federal Banking System.

The ruling, therefore, of the Appellate Court of Florida, under the doctrine of usury, not only shatters the concept of Title 12, U.S.C.A., Paragraph 86, but shatters and holds to be null and void the acts of a National Bank when it is acting solely and well within the purview and directions of the Comptroller of Currency who was in charge of the operation of National Banks. If the actions of the National Bank were in full accordance with the rules and regulations governing National Banks or State Banks which were under the Federal Reserve System, then it is no concern of the State of Florida and its Courts, to hold for naught and to void or to place extraneous constructions upon the control factors of the National Banks.

The Appellate Court of Florida in its opinion (119 So.2d 747, first column) referred to subsequent cases collected at 12 U.S.C.A. 343. The only case referred to under that heading is *Federal Reserve Bank of Richmond, Va.*, v. *Duffy et al.*, 188 S.E. 82, 210 North Carolina 598. The case does not support the statements made by the Ap-

pellate Court in its opinion, but the effect of the case is to hold just to the contrary.

In this case there was an action brought by the Federal Reserve Bank of Richmond, Virginia, in the State Court of North Carolina. F. S. Duffy had executed a note payable to the First National Bank of New Bern, North Carolina, and that bank thereafter transferred the note by endorsement to the Federal Reserve Bank of Richmond. This note was secured by a mortgage on real estate. The note was dated September 12, 1929, and was assigned for discount to the Federal Reserve Bank of Richmond on September 14, 1929. The credit was extended from the Federal Reserve Bank to the New Bern Bank as of the date September 14, 1929. About six weeks later, on October 26, 1929, the First National Bank of New Bern closed its doors. The makers of the note above referred to had on deposit with that bank certain sums which they claimed they had a right to set off against any indebtedness due to the bank, including the indebtedness represented by the note of September 12, 1929, which had been assigned and discounted to the Federal Reserve Bank.

The Federal Reserve Bank then brought suit, and the defendants contended that the Federal Reserve Bank acted in bad faith when it took this note for discount. They contended that the note was ineligible for discount, and that therefore the Federal Reserve Bank, the plaintiff, was not entitled to the position of a holder in due course so as to deprive the defendants of the right of set-off to the amount of their deposit in the closed bank.

The Supreme Court of North Carolina held that even if the plaintiff had accepted for discount paper declared illegal by the act or by the rules under federal procedure, the defendant who owed the debt could not complain. They relied upon a decision by Circuit Judge Parker in *Lucas* v.

Federal Reserve Bank, 59 F.2d 617, 620. In this case, which was quoted in detail in the opinion of the North Carolina Court, the fundamental rule was laid down that the exercise of powers or incidental powers under the Federal Reserve Act was solely a matter for federal determination, and held that even though there were technical rules in the discounting of paper that might have caused the Comptroller of Currency or the Federal Banking Examiners to question the validity of the transaction, yet the borrower had no position to question it, stating (p. 84, column 2):

> "It is equally clear that whatever the power of the Federal Reserve Bank with respect to taking as collateral paper not eligible for discount, no one can complain of such action except the government, the sovereign which created and limited its powers. * * *"

Then the Court said:

> "Defendants contend further that the relationship between the Federal Reserve Bank of Richmond, Va., and member banks was such as to constitute the latter the agent of the former, and thus impute notice to the principal of all facts known to the member bank. * * *"

But the Supreme Court of North Carolina rejected that doctrine, stating:

> "Where the agent is dealing in his own behalf, or has personal interest to serve, the knowledge of agent is not imputable to the principal. * * *
>
> Here the First National Bank of New Bern, seeking to secure additional funds to continue a failing business, negotiates a valid paper, which, on its face, is entirely proper and eligible for discount by the plaintiff, but fails to disclose facts which might have prevented its discount, and thereby obtains advances from the plaintiff for its own purposes. The New Bern bank was acting in its own interest, adversely to the plaintiff, in selling to the plaintiff the New Bern bank's

property, and hence knowledge of bad faith, if any, on its part cannot in law be imputed to the Federal Reserve Bank."

Applying that principle of law expressed in said opinion and supported by Federal authorities, how could it be said that the Pan American Bank of Miami had constituted The Coral Gables First National Bank its agent, when it did not even come into the loan transaction until two weeks after the National Bank had already consummated the loan and had made advances of $400,000 in principal sum to the borrower. The State Bank had nothing to do with the original loan and nothing to do with the securing of the collateral, and had nothing to do with the interest rate fixed between the borrower and the National Bank. How could that subsequent transaction relate back to establish the two essential points found by the State Court—

1. That the subsequent participation of the State Bank by a retroactive measure constituted the National Bank its agent, or

2. How could that subsequent participation create a relationship where the National Bank was used as a subterfuge or as a conduit by which the State Bank sought to lend its money at a usurious rate of interest under the guise of protection of the National Bank, and Title 12, U.S.C.A., Paragraph 86.

These are simply imaginary and fictitious conclusions drawn by the Appellate Court of Florida, not based upon any facts, but asserted as a flimsy and unsupported foundation for assessing collateral punitive damages against the National Bank.

While not definitely pointed out, there seems to be a trend running through the theory of both the lower court

and the Appellate Court of Florida that if The Coral Gables First National Bank, as a National Bank, had handled this deal by itself, then the Federal Act would apply. However, it seems to be intimated, if not actually held, that where the National Bank, after the loan was made, subsequently participated some of that loan, as it had a right to do, to any member of the Federal Reserve System, and the actual participation was made to a Florida State Bank, that then the National Bank lost all of its rights or protection, as it may be called, under the Federal Statute.

A very similar case, at least similar in principle, has been decided by this Court since the filing of the petition in this cause. On December 5, 1960, which was several days after this petition was filed, this Court rendered its opinion in the case of *Small Business Administration, Petitioner* v. *G. M. McClellan, Trustee,* 81 S. Ct. 191 (Supreme Court Rep. Advance Sheet, December 15, 1960). In this case, the Supreme Court of the United States reversed the decision of the United States Court of Appeals for the Tenth Circuit (272 F.2d 143).

Referring to the facts set forth in the Court of Appeals opinion, it appears that one Byquist had made an application on a Small Business Administration form, entitled "Limited Loan Participation Application for Loan", to the Brookville State Bank of Brookville, Kansas, for a $20,000 loan. On October 30, 1956, the Bank endorsed the application to show that it was willing to make the loan upon the participation of SBA therein to the extent of 75%. On November 19, 1956, SBA agreed and entered into a participation agreement with the Bank. It was agreed that upon request by the Bank, SBA would purchase a 75% interest; that the Bank would hold the note and on 5 days written demand would transfer it to SBA; that the holder of the note, whoever it might be, would service it and re-

mit promptly to the other party its pro rata share. SBA and the Bank were to bear any loss incurred ratably according to their respective interests in the loan.

On November 21, 1956, SBA sent the Bank its check in the amount of $15,000 for the sole purpose of purchasing a 75% interest in the loan. The State Bank then loaned $20,000 to Byquist who executed and delivered a note payable to the Bank. This loan was on the form authorized by SBA.

On September 5, 1957, Byquist was adjudicated a bankrupt and subsequent to the date of bankruptcy the Bank assigned the note to SBA. SBA then filed its claim on October 15, 1957, for the entire unpaid balance on the note in the sum of $16,788.42, and claimed priority therefor.

The Referee and the United States District Court, as well as the United States Court of Appeals, Tenth Circuit, held that the State Bank was the primary creditor, and that the United States in its participation through SBA was only a beneficial owner of a part of the debt. The opinion of the United States Court of Appeals, Tenth Circuit, pointed out (p. 145) that the United States, through SBA, was bound by its written contract to account to the State Bank for 25% of any collections made under the note, and that therefore the Bank would share to that extent in any proceeds resulting from the award of a priority to the United States. That Court pointed out that no such priority to a private creditor is provided for. That Court ended its opinion as follows (146):

> "The United States has engaged in a commercial enterprise and made no effort to safeguard its rights under §3466. In a contract made on its own forms it has agreed to share ratably proceeds and losses. It may not assert a priority which will produce a re-

covery that by contract must be divided with a private entity."

However, the Supreme Court of the United States reversed that decision, and the question was squarely put in the opinion by Mr. Justice Black (83 S. Ct. 193):

> "The basic question this case presents is whether, when the Administration has joined a private bank in a loan and the borrower becomes a bankrupt, the Administration's interest in the unpaid balance of the loan is entitled to the priority provided for 'debts due to the United States' in R.S. §3466 and §64 of the Bankruptcy Act, even though the Administration has agreed to share any money collected on the loan with the private bank."

The Court in its opinion pointed out that the District Court had concluded that since the bankrupt's note evidencing the loan was not assigned by the Bank to the Administration until after the commencement of the bankruptcy proceedings, the debt was not entitled to priority. Then the Court in its opinion pointed out that the Court of Appeals upheld that general order, holding that the Administration having contracted to pay to the participating private bank one-fourth of any distribution received, it could not assert its priority and thus have a private party benefit from the priority. But this Court overruled those contentions and said that where the debt was sought to be collected by a Federal Agency, the fact that the Administration had contracted to pay to the participating private bank one-fourth of any money it later collects on the loan, does not mean that the Government must lose its priority, the Court stating (195):

> "Respondent's argument to the contrary seems to rest upon the assumption that the Government is deprived of its priority by making a contract to pay a

part of its funds to another creditor of the bankrupt who has no priority."

Then, further, this Court said (196):

"The purpose of these sections is simply to protect the interest of the Government in collecting money due to it. Once that money is collected and placed in the Government Treasury, the end sought to be achieved by §3466 and §64 of the Bankruptcy Act is completely satisfied. At that point, there is no difference between the money so received and money received from any other source and, like other money, it may be disbursed in any way the Government sees fit, including the satisfaction of obligations already incurred, so long as the purpose is lawful. The Small Business Administration is authorized to enter into contracts calculated to induce private banks to make loans to small businesses. The contract involved in this case, by providing additional security to the private bank at the Government's expense, is well adapted to that end. Indeed, in many cases such a contract may be the only way the Administration could induce private bank participation in a necessary loan. In those cases, acceptance of respondent's argument would make it more difficult for the Administration to perform its statutory duties. Clearly Congress did not intend, by the very act of imposing duties upon the Administration, to take away a privilege necessary to the effective performance of those duties.

* * * Respondent's argument from the policy of equality of distribution for similar creditors expressed in the Bankruptcy Act is no more convincing. It is true that the allowance of the priority asserted here will place the bank, a private unsecured creditor, in a better position than other private unsecured creditors. But this position is a result, not of any inequality of distribution on the part of the bankruptcy court, but of the bank's valid contract with the Small Business Administration."

Applying the theory of that case to the situation now at hand, we find that the position of a National Bank under Sections 85 and 86 of Title 12, U.S.C.A., is stronger than the facts presented in the *Small Business Administration* case. Here the National Bank made the initial loan. It expended out of the National Bank's assets $400,000 approximately for advances on the $442,400 loan. At that point the National Bank was the only party in privity with Constructors of Florida, Inc., the borrower. The note was in its name and the security pledged was in the name of the National Bank. It was then no concern of the borrower what disposition the National Bank made of that loan. It could have assigned that loan either to a National Bank or any other member of the Federal Reserve. It could have sold it outright to third parties or it could hold the note and grant participations which were allowed under the Federal Reserve Act to either State or Federal Banks in whole or in part under the doctrine of participations. It had the right to make any terms as to the participation and interest return that it saw fit. This did not render any of the holders of the participation certificates in privity with the original borrower.

Admittedly, some two weeks after the loan had been consummated, on November 14th, a State Bank, also a member of the Federal Reserve System, took a participation for 55%, but at a restricted 5% interest agreement. This was a matter solely between the National Bank as the holder of the note and the collateral, and its participant. This did not amount to an assignment of the loan or any transfer of any legal title to the note or to the security. Whatever protection the National Bank had at the time the loan was consummated on November 14th, 1956, was not lost or waived by the National Bank. When the National Bank, pursuant to the terms of its note con-

tract, called this loan, it was acting pursuant to its contractual rights, and the State Bank had nothing to say about the action which the National Bank took. The State Bank was not even a party to the so-called renegotiated loan or the new loan of March 20, 1957. The State Bank did take a small participation in that loan, but that was by separate contract. After Constructors of Florida, Inc., became insolvent and the foreclosure was instituted by the National Bank in the fall of 1957, the National Bank was the primary plaintiff in that foreclosure. The only reason the State Bank was required to be joined as a proper, but not a necessary, party plaintiff was because of the rulings of the Comptroller of Currency, Ruling 1135A, which in simple and concise language, as we interpret it, provides that where there are defaults of interest or principal payments under the loan which is held by the National Bank, then the participating banks shall share in all subsequent loan payments and collections in proportion to the percentage of participation held by each bank at the time of the default, the appointment of a receiver or bankruptcy. This rule applied to loans secured by personal property as distinct from real estate loans.

Applying these same principles as laid down by this Court in the *Small Business Administration* case, *supra*, the total claim of the Coral Gables First National Bank came squarely under the provisions of Sections 85 and 86 of Title 12, U.S.C.A. The opinion of the Courts of Florida attempting to strip the National Bank of its protection is clearly violative of the Federal law.

CONCLUSION.

In a preliminary part of this petition for certiorari we emphasized that we were submitting this question to the Supreme Court of the United States solely on the point that, assuming but not admitting that usury was found to have been exacted by the National Bank by the State Court decision, and that approximately $11,000 of interest was paid by Constructors to the Coral Gables First National Bank, did the Federal Statute, Title 12, U.S.C.A., Par. 86, restrict the penalty of recovery against the National Bank to twice the amount of the interest actually paid, which would have approximated $22,000?

If that is the limit of the penalty, then the National Bank was entitled to recover approximately $110,000 of principal, which was the balance due on the undisputed mortgages of July, 1956, plus interest and attorneys' fees. The National Bank would be entitled to recover approximately $151,000, which was the balance of the principal due on the re-negotiated mortgage note of November 14, 1956, as revised by the note of March 20, 1957, plus attorneys' fees, less the credit of approximately $22,000, which is double the amount of the interest actually paid by Constructors of Florida to the Coral Gables First National Bank.

If this Court holds that the Federal Statute limits the penalties to that amount since the title to all of the mortgages and notes was in the Coral Gables First National Bank, then the Coral Gables First National Bank could recover, and the Pan American Bank of Miami as the participant would then have its percentage of the participation.

In this event that part of the decrees and opinions of the Florida Courts extinguishing the lien and priority of the National Bank's mortgages as a penalty for coming into equity with unclean hands, would be automatically avoided. Thus also would be avoided the affirmative judgment against the Pan American Bank which was not even in privity with Constructors of Florida, and the offset judgment against the National Bank would be reduced from some $74,000 down to approximately $22,000.

Respectfully submitted,

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APPENDIX

INDEX TO APPENDIX

Partial Final Decree of the Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida, Dated June 26, 1958 A1-A14

Order Amending Partial Final Decree, Dated July 2, 1958 A15-A19

Opinion of District Court of Appeal of Florida, Third District, Filed March 22, 1960 A19-A34

Mandate from District Court of Appeal of Florida, Third District, of May 4, 1960 A35-A36

Order and Judgment on Mandate, April 14, 1961 A37-A41

Notice of Interlocutory Appeal Filed April 17, 1961 A42-A43

Assignments of Error Filed April 17, 1961 A44-A47

Order of District Court of Appeal of Florida, Third District, May 25, 1961 A48

Order of Supreme Court of Florida July 24, 1961, Denying Petition for Writ of Certiorari A49

Order of Supreme Court of Florida September 26, 1961, Denying Petition for Rehearing A50

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA.

IN CHANCERY No. 205613-E.
(Judge Crawford.)

THE CORAL GABLES FIRST NATIONAL BANK, etc., and PAN AMERICAN BANK OF MIAMI, etc.,
Plaintiffs,

vs.

CONSTRUCTORS OF FLORIDA, INC., et al.,
Defendants.

PARTIAL FINAL DECREE.

THIS CAUSE coming on to be tried before the Court and The Coral Gables First National Bank, the Pan American Bank of Miami, Constructors of Florida, Inc., City of West Palm Beach, American Surety Company of New York, Richard R. Reynolds, James M. Lancaster, Jr., Earl L. Goodwin, Russell A. Ortmayer, Harold S. Flagg and Tom Maxey having presented their testimony together with that of their witnesses and presented the documentary exhibits to be considered by the Court, and after consideration of the matter, the briefs of counsel, the Court

FINDS:

On September 20, 1957, the Coral Gables First National Bank, and the Pan American Bank of Miami, as Plaintiffs, filed their Bill of Complaint against Construc-

tors of Florida, Inc., City of West Palm Beach, American Surety Company of New York, Richard R. Reynolds, Jim M. Lancaster, Jr., Earl L. Goodwin, Island Construction Company, Pecon Construction Company, J. C. Bledsoe, Russell A. Ortmayer, Harold S. Flagg, Tom Maxey, and the United States of America, as Defendants, seeking to foreclose three (3) chattel mortgages, in the amount of $13,888.95, $92,690.85 and $151,802.46, and to impose liability for any deficiency on American Surety Company of New York and the City of West Palm Beach.

All defendants who were served with process filed their answers denying liability; and, in addition, setting up counterclaims against the Banks.

Constructors of Florida, Inc. and Messrs. Reynolds, Lancaster, Goodwin, by their counterclaim, alleged that the larger of the three (3) loans sought to be foreclosed, in the original principal amount of $442,400.00 was in fact usurious; that the Banks breached their contract to loan money to Constructors of Florida, Inc. by withholding from Constructors of Florida, Inc. the major portion of the proceeds of said larger loan; and that by said breach the Banks impaired the working capital of Constructors of Florida, Inc., thus ruining Constructors of Florida, Inc. and causing substantial damages; moreover, that the Banks, as a part of their conspiracy and scheme to collect usurious interest, caused Messrs. Reynolds, Lancaster, and Goodwin to decline a bona fide offer to purchase forty (40%) percent of the stock of Constructors of Florida, Inc. for the sum of $400,000.00, all to the damage of Constructors of Florida, Inc., and its principals, in the amount of $3,674,480.76 as to the corporation, and $2,342,379.19 as to its principals.

American Surety Company of New York, in addition to adopting the allegations of the counterclaim filed by

Constructors of Florida, Inc., and its principals, also by its counterclaim, alleged fraud and deceit on the part of the Banks, in that the Banks gave to American Surety Company of New York false and fraudulent information concerning the financial condition of Constructors of Florida, Inc., which information American Surety Company of New York believed and acted upon, thus causing American Surety Company of New York to refrain from taking action to prevent losses on its then outstanding bonds, and, further causing American Surety Company of New York to write additional bonds on the strength of the credit and quick assets of Constructors of Florida, Inc., all to the damage of American Surety Company of New York in the amount of $1,367,379.19.

The City of West Palm Beach, in its counterclaim, adopted the factual allegations of the counterclaims filed by the other defendants and counterclaimants, and alleged that the actions of the Banks were the direct and proximate cause of the City's being forced to take over the contracts held by Constructors of Florida, Inc. with the City of West Palm Beach, all to the damage of the City of West Palm Beach in the amount of $279,423.58.

John Nicholas, as Receiver in Bankruptcy of Constructors of Florida, Inc. was allowed to intervene by the Court and filed his answer and counterclaim against the Plaintiffs and adopted the pleadings, answer and counterclaim filed in the cause on behalf of Constructors of Florida, Inc. together with answer and counterclaim directed against the other Defendants.

Pecon Construction Company and J. C. Bledsoe were never served with process.

The trial of the first phase of the suit was limited to the "primary" issues between the principal parties.

Constructors of Florida, Inc., a Florida corporation was organized in 1955 with Richard R. Reynolds, Jim M. Lancaster, Jr. and Earl L. Goodwin as principals. The Corporation was very busy and in October 1956 it was engaged in the completion of some eighteen (18) municipal, state and federal governmental contracts throughout the State of Florida, having a total value of about $3,800,000.00. The Corporation needed a large amount of working capital. In negotiations between the Corporation and The Coral Gables First National Bank, a loan was entered into on November 14, 1956, in the principal amount of $442,400.00, repayable at $3,000.00 per month principal, plus interest at 5% per annum for twenty-three (23) months with a balloon or final payment on the twenty-fourth month of $373,400.00, plus interest at 5% per annum. This loan was secured by chattel mortgage on all motors and equipment of the Corporation and by "assignment" of payments due from the City of West Palm Beach to the Corporation on sewer contracts 7 and 9. At that time the Corporation was indebted to The Coral Gables First National Bank on account of the remaining principal balance of two equipment payment consolidating loans made in July 1956, in the amounts of $19,444.53 and $129,767.19 or a total of $149,211.72. Preliminary to the large loan of November 14, 1956, the Banks also granted a $60,000.00 interim loan to the Corporation on October 5, 1956. This interim loan was secured by a corporate resolution directing the City of West Palm Beach to mail checks payable to Constructors of Florida, Inc. for work done on contracts 7 and 9 to The Coral Gables First National Bank. This resolution plus agreement to so mail said checks by the City of West Palm Beach constituted the "assignment" referred to above.

The Coral Gables First National Bank in making the loan of $442,400.00 actually paid to Constructors of Florida, Inc. $202,562.38, since they paid to themselves from the

proceeds of the loan the existing $60,000.00 indebtedness of the Corporation. In addition, the Banks deducted $44,240.00 as a commitment fee and $44,854.44 as discount or interest paid in advance. Furthermore $90,743.18 was deposited in a new account called "Collateral Account No. 1" which was a controlled account requiring the signature of a Vice-President of the Banks and an officer of Constructors of Florida, Inc. Upon the Corporation's asking the Banks for an explanation of these charges, it was explained that there was an error in making the commitment fee charge of $44,854.44 and that this amount would be paid into Collateral Account No. 1. This was done increasing this account to a total balance of $135,597.62. The Banks further stated that the charge of $44,240.00 would be treated as pre-paid interest, i. e., 5% per year for two years or a total of 10%. The face of the $442,400.00 note provided only for interest at the rate of 5% per annum, payable monthly for twenty-three months with the small $3,000.00 per month principal payment with the balance of interest and principal due on the twenty-fourth month. The discount interest charge was in addition to the interest rate shown on the face of the note.

The Coral Gables First National Bank also created "Collateral Account No. 2" which was a controlled account requiring the joint signature of an officer of the Banks and of the Corporation, and into this account was paid on November 29, 1956, $36,488.11; December 24, 1956, $42,750.32; January 24, 1957, $53,247.39; February 26, 1957, $24,168.04; and on March 1, 1957, $37,502.25, making a total of $194,156.11, all as payments made to Constructors of Florida, Inc., by the City of West Palm Beach. The understood terms of the loan at the time of its making did not contemplate such controlled accounts and there was no such provisions set forth in any contract documents.

During the months of December 1956 and January 1957, the affairs of Constructors of Florida, Inc. appeared to progress well. From time to time, the Corporation called upon the Banks to release to their use certain of the funds held by the Banks in Collateral Account No. 1.

These requests were granted and the entire amount originally withheld in Collateral Account No. 1 was paid over to Constructors of Florida, Inc. by January 7, 1957. During the time of these advances from Collateral Account No. 1, the Banks had received and deposited in Collateral Account No. 2, the sum of $122,749.34, and by the end of February 1957, a net balance of $179,540.67; the Banks receiving in Collateral Account No. 2 more money than disbursed from Collateral Account No. 1. About this time the Corporation requested the Banks to advance $100,000.00 of the amount held in Collateral Account No. 2, which the Banks claimed was being held as additional security and which the Corporation thought was capital available for its use. Through continuous negotiations between the Corporation and the Banks, the request was reduced to $50,000.00 and indications were made by the Banks that it would be granted. On March 4, 1957, an officer of the Corporation left a signed check, in blank and undated, with the Banks so that funds in the amount of $50,000.00 could be deposited in the corporate account and withdrawn by the Corporation on the following day. The Banks, however, completed the check for the total amount remaining in Collateral Account No. 2 of $179,540.67 and without the knowledge or consent of the Corporation applied the same to the reduction of the face amount of the $442,400.00 loan. The Banks had, up to this time, apparently thought that the Corporation loans were secured by guarantee of the American Surety Company of New York and on March 4, 1957, realized that this was not true in fact.

When the $442,400.00 loan was made, it was beyond the legal lending limits of The Coral Gables First National Bank.

As of November 14, 1956, Constructors of Florida, Inc. was indebted to Coral Gables First National Bank in the amounts of $19,444.53 and $129,767.19, the unpaid balance then due on the equipment notes dated July of 1956, and in the amount of $60,000.00 on the interim loan. $202,562.38 was actually paid to Constructors of Florida, Inc. on account of the $442,400.00 loan of November 14, 1956, so that the actual net cash which had been paid over to Constructors of Florida, Inc. by Coral Gables First National Bank, as of November 14, 1956, was $411,774.10. However, Pan American Bank of Miami, as participant in each of these three (3) loans, was debited by Coral Gables First National Bank with the sum of $19,444.53, $129,767.19, and $243,320.00, or a total of $392,531.72. Actually, therefore, Coral Gables First National Bank was merely a conduit, and agent; the new loan of $442,400.00 did not, according to the books and records of Coral Gables First National Bank, increase the net amount of the indebtedness of Constructors of Florida, Inc.; rather the net amount of indebtedness to Coral Gables First National Bank, after the new loan of $442,400.00, actually decreased from $209,211.62 to $19,242.38, a net decrease of $188,969.24. In other words, immediately prior to the consummation of the alleged $442,400.00 loan on November 14, 1956, Constructors of Florida, Inc. was indebted to Coral Gables First National Bank in the amount of $209,211.62; immediately after the consummation of the alleged $442,400.00 loan, Constructors of Florida, Inc. was indebted to Coral Gables First National Bank only in the small amount of $19,242.38. By loaning $393,531.72 of the money of Pan American Bank of Miami, Coral Gables First National Bank decreased its outstanding loans by $188,969.24.

In early March of 1957, Constructors of Florida, Inc. was in financial difficulty finding itself unable to meet the current payroll. After The Coral Gables First National Bank had applied $179,540.67, the balance of Collateral Account No. 2, to the payment of the outstanding loan, a meeting was held by the officials of The Coral Gables First National Bank, Pan American Bank of Miami, Constructors of Florida, Inc. and American Surety Company of New York. Mr. Eduardo Morales of Pan American Bank, Mr. Riley and Mr. McGoogan of The Coral Gables First National Bank, Messrs. Reynolds, Lancaster and Goodwin for the Corporation and Mr. Harold S. Flagg for the Surety Company participated in a general discussion of the financial position of the various parties at that time. It was then agreed that out of the remaining amounts to be collected on the City of West Palm Beach sewer contracts 7 and 9, approximately 65% thereof would go to retire the indebtedness to the Banks and approximately 35% thereof would be deposited into a controlled trust account to be used by Constructors of Florida, Inc. The loan repayment agreement of March 20, 1957 was executed together with the renewal contract note of that date in the amount of $218,275.25 providing for a straight 15% interest per annum. A usury release was executed together with personal guarantees by the three officers of Constructors of Florida, Inc. These documents were executed under compulsion and force of the precarious financial circumstances then existing due to the wrongful manner in which the loan accounts had been handled by the Plaintiff-Banks, are void and without consideration.

The Corporation never recovered from this point on and shortly thereafter complete default occurred on contracts and corporate business.

The Plaintiff-Banks, on account of the loan of $442,400.00 of November 14, 1956, had actually charged Con-

structors of Florida, Inc., total interest in the amount of $49,855.44, which is fifty-six and 27/100ths (56.27%) percent per annum on the actual moneys disbursed to Constructors of Florida, Inc. on account of said loan, based on a 365 day year, or fifty-five and 5/10ths (55.5%) percent per annum based on a 360 day year.

The total interest reserved on the face of the note, when added to the $44,240.00 retained by the Banks as interest taken in advance, discount, or commitment fee, amounted to a total of $85,029.92 actually reserved, charged, or taken by the Banks.

The transfer of $135,597.62 by the Banks on November 14, 1956 to Collateral Account No. 1, a controlled account requiring the signature of an officer of the Banks, was not a payment to the account of the Corporation for which interest could be charged. Title to the funds did not belong to the Corporation until delivered to them free of control.

The payments by the City of West Palm Beach in periodical installments between November 29, 1956 and March 1, 1957 of $194,156.11 into Collateral Account No. 2, a controlled account requiring the signature of an officer of the Banks, did amount to payments to the Banks of cash collateral requiring a rebate of interest charged on like amounts outstanding.

It appears that under any lawful and reasonable contention the Banks charged Constructors of Florida, Inc. at least thirty-eight and 40 100ths (38.40%) percent interest on the $442,400.00 loan and fifty-six and 27/100ths (56.27%) percent if you use only the actual amount of the said loan which was made available to the uncontrolled account of Constructors of Florida, Inc. It seems without question

that the interest charged and reserved exceeds twenty-five (25%) percent per annum.

It therefore follows that under Sec. 687.04 and 687.07, Florida Statutes 1957 the notes and mortgages sued upon by the Plaintiff-Banks are void and of no force and effect.

The Plaintiff-Banks are liable to Constructors of Florida, Inc. as follows:

(a) For double the amount of discount, commitment fee or interest paid in advance, in the amount of $44,240.00			$88,480.00
(b) For double the interest reserved on the face of the note, in the amount of $40,789.92, as shown by Schedule 2, Column 1 of Pentland, Purvis, Keller & Co. audit, Plaintiffs' Exhibit No. 47			81,479.84
(c) For cancellation of the principal amount allegedly remaining due thereon			151,802.46
(d) For recovery of all amounts previously paid thereon, as follows:			
Amount of note	$442,400.00		
Less balance	151,802.46		
Principal paid		$290,597.54	
Interest paid per Schedule 1, Plaintiffs' Exhibit No. 47		14,271.38	
Total previous paid			$304,868.92
Total Usury Damages			$626,731.22

Inasmuch as the Plaintiffs were joint adventurers, and agent and principal each for the other, each is liable for the total amount of such damage, and the Federal Banking Code has no application to prevent imposition of the statutes of the State of Florida as to usury penalties.

At the time the Banks wrongfully applied the balance of $179,540.67 remaining in Collateral Account No. 2 to the reduction of the face amount due of the $442,400.00

loan, neither of the notes of July 25, 1956 and July 24, 1956 held by the Banks and secured by chattel equipment mortgages, were due or in default. The action of the Banks helped bring about the subsequent defaults in these loans and the amount seized by the Banks from Collateral Account No. 2 was more than enough to pay said loans in full or keep them current and in good standing. The debts are still due on said notes by the Corporation to the Banks in the amounts of $14,326.77 and $95,636.77 principal and interest included to May 1, 1958, respectively, but the notes and mortgages are not in default and not subject to foreclosure in this action. They may be paid in accordance with their respective terms with principal payments held to be in abeyance from time of alleged default to time of the entry of complete Final Decree in this case. The lien of the mortgages securing said debts are unenforceable as the Banks are not in equity with clean hands. The lien of the City of West Palm Beach and American Surety Company of New York against such chattel and equipment of the Corporation are superior to any claims of the Banks asserted in this proceeding.

The evidence is not sufficient to prove to the satisfaction of this Court by a preponderance that the Plaintiff-Counter-Defendant Banks are solely responsible or liable for all damages suffered by Constructors of Florida, Inc., resulting from the collapse of its business and forfeiture of its contracts.

The evidence is not sufficient to prove to the satisfaction of this Court by a preponderance that the Plaintiff-Counter-Defendants Banks are solely responsible or liable for all damages suffered by Richard R. Reynolds, Jim M. Lancaster, Jr. and Earl L. Goodwin resulting from the loss of value of the stock of Constructors of Florida, Inc., loss

of profits, or liability on personal guarantees other than those given to said Banks.

The evidence is not sufficient to prove to the satisfaction of this Court by a preponderance that the Plaintiffs-Counter-Defendants Banks are solely responsible or liable for all damages suffered by the City of West Palm Beach in connection with the completion of sewer contracts 7 and 9.

The evidence does show that the City of West Palm Beach did not agree in any way to guarantee any part of the loan made by the Banks to Constructors of Florida, Inc. There is no basis whatever for any equitable subrogation in favor of the Banks and against the City of West Palm Beach.

The evidence does show that the City of West Palm Beach is protected in the amounts expended to complete sewer contracts 7 and 9 by bonds written by the American Surety Company of New York. As secondary security, in case the American Surety Company of New York did not make good on said bonds, the City of West Palm Beach has an equitable lien, superior in right and dignity to any other lien or mortgages held by the Banks herein (except that of American Surety Company of New York after having made good on said bonds) covering all machinery and equipment of Constructors of Florida, Inc. located at West Palm Beach as of August 26, 1957.

The evidence is not sufficient to prove to the satisfaction of this Court by a preponderance that the Plaintiff-Counter-Defendant Banks are solely responsible or liable for all damages suffered by the American Surety Company of New York on account of the various bonds written and continued for Constructors of Florida, Inc., and Island Construction Co.

The evidence does show that the American Surety Company of New York did not agree in any way to guarantee any part of the loans made by the Banks to Constructors of Florida, Inc. There is no basis whatever for any equitable subrogation in favor of the Banks and against American Surety Company of New York.

The evidence further shows that Constructors of Florida, Inc. are indebted to American Surety Company of New York in the amount of $1,367,379.19 on account of the various bonds written and continued for said Corporation or guaranteed by said Corporation. This amount is secured by the General Indemnity Agreement held by the Surety Company.

The evidence further shows that the General Indemnity Agreement (marked Defendant's Exhibit B) provides that Constructors of Florida, Inc. pay to American Surety Company of New York all reasonable attorneys' fees, costs and expenses incurred by American Surety Company of New York in defense of any action brought on or in connection with any of the bonds written on behalf of Constructors of Florida, Inc. As a part of the consequential damages which proximately and naturally flow from the Banks usurious charges and the improper manner in which the loan accounts were handled by them, such attorneys' fees are found to be a part of the damages which Constructors of Florida, Inc. should recover against the Banks in that Constructors of Florida, Inc. has obligated itself to pay such attorneys' fees to American Surety Company of New York. A reasonable fee is hereby fixed in the amount of $45,000.00.

The evidence further shows that under the terms and provisions of the mortgage which American Surety Company of New York is foreclosing by this action against Constructors of Florida, Inc. in the principal amount of ap-

proximately $1,367,379.19, Constructors of Florida, Inc. is obligated to pay American Surety Company of New York such reasonable attorneys' fees as may be fixed by this Court for the foreclosure of said mortgage. The amount of these attorneys' fees are found to be a part of the consequential damages which proximately and naturally flow from the Banks usurious charges and the improper manner in which the loan accounts were handled by them, and such attorneys' fees should be recovered by Constructors of Florida, Inc. from said Banks. A reasonable fee is hereby fixed in the amount of $27,347.58 (2% of amount foreclosed).

The charges and actions of the Banks in the handling of the loan accounts contributed materially to the collapse of Constructors of Florida, Inc. and the attorneys' fees fixed herein together with the costs of this proceeding should be and are taxed against said Banks.

The motions of the various parties made throughout the proceedings upon which ruling was reserved by the Court in two prior orders are all hereby denied.

This Partial Final Decree is subject to the undetermined claims and counterclaims of the "secondary issues" and parties not herein decided. A "Final Decree" will be issued by the Court at the conclusion of the entire matter implementing the findings made herein and disposing of all issues between all parties.

DONE AND ORDERED at Miami, Dade County, Florida, this 26th day of June, 1958.

s/ GRADY L. CRAWFORD
Circuit Judge

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA. IN CHANCERY.

Case No. 205613-E.
(Judge Crawford)

CORAL GABLES FIRST NATIONAL BANK, etc., and PAN AMERICAN BANK OF MIAMI, etc.,
Plaintiffs,

vs.

CONSTRUCTORS OF FLORIDA, INC., et al.,
Defendants.

ORDER AMENDING PARTIAL FINAL DECREE.

THIS COURT having again considered the case of *Rosenblum* v. *Hart*, (Supreme Court of Florida, May 8, 1957) 95 So.2d 18, hereby amends that Partial Final Decree entered herein on the 26th day of June, 1958, by substituting new pages 9 and 9-a attached hereto and made a part hereof for and in lieu of page 9 which is contained in the said Partial Final Decree, and hereby orders and decrees,

That except as provided herein the said Partial Final Decree as entered by this Court be and the same shall remain in full force and effect, and this Court hereby ratifies and approves in all respects the said Partial Final Decree as amended by the attached new pages 9 and 9-a which shall be considered as a part of the said Partial Final Decree just as if they had been inserted therein in the first instance.

DONE and ORDERED at Miami, Dade County, Florida, this 2nd day of July, 1958.

s/ Grady L. Crawford
Circuit Judge

Inasmuch as the plaintiffs were joint adventurers, and agent and principal each for the other, each is liable for the total amount of such damage, and the Federal Banking Code has no application to prevent imposition of the Statutes of the State of Florida as to usury penalties. Accordingly, plaintiff, CORAL GABLES FIRST NATIONAL BANK, is liable either to CONSTRUCTORS OF FLORIDA, INC. or to its Receiver, under the terms of the Federal Banking Code (12 U.S.C.A. Sec. 86 , and plaintiff, PAN AMERICAN BANK OF MIAMI, is liable either to CONSTRUCTORS OF FLORIDA, INC. or to its Receiver, under the terms of Sec. 687.07, Florida Statutes, 1957, as follows:

(a) Liability of Coral Gables First National Bank	
(1) For double the interest collected prior to March 20, 1957, in the amount of $49,855.44, as per Schedule 1, Pentland, Purvis, Keller & Co. audit, Plaintiffs' Exhibit No. 47	$ 99,710.88
(2) For double the interest collected subsequent to March 20, 1957, in the amount of $5,370.35, per note jackets covering the renewal contract note, Defendants' Exhibits I and J	10,740.70
	$110,451.58
Less amount credited to principal on re-negotiation	35,584.06
	$ 74,867.52
(b) Liability of Pan American Bank of Miami	
(1) For the principal and interest paid prior to March 20, 1957, as per Schedule 1, Pentland, Purvis, Keller & Co. audit, Plaintiffs' Exhibit No. 47	$194,156.11

(2) For the principal paid subsequent to March 20, 1957, as per note jackets (Defendants' Exhibits I and J) covering the portions of the renewal contract note ostensibly held by each of the Plaintiffs and proved by the following computation:

Balance due as of March 20, 1957	$218,275.27	
Less, balance remaining due	151,802.46	
		$ 66,472.81

(3) For the interest paid subsequent to March 20, 1957, as per the same note jackets (Defendants' Exhibits I and J) 5,370.35

Total principal and interest due by Pan American Bank of Miami (as per the above and as per testimony of Esten A. Ulmer, C.P.A., ending at Tr. 774) $265,999.27

(c) Liability of both Plaintiff-Banks

For cancellation of principal and interest allegedly remaining due, as per note jacket (Defendants' Exhibits I and J) and testimony of Frank W. Colton, at Tr. 627, Tr. 650)

	Principal	Interest	Total
Jacket I	$136,622.22	$18,733.34	$155,355.56
Jacket J	15,180.24	2,049.49	17,229.73
Total	$151,802.46	$20,782.83	$172,585.29

$172,585.29

Total Usury Damages $513,452.08

At the time the Banks wrongfully applied the balance of $179,540.67 remaining in Collateral Account No. 2 to the reduction of the face amount due of the $442,400 loan, neither of the notes of July 25, 1956 and July 24, 1956 held by the Banks and secured by chattel equipment mortgages, were due or in default. The action of the Banks helped bring about the subsequent defaults in these loans and the amount seized by the Banks from Collateral Account No. 2 was more than enough to pay said loans in

full or keep them current and in good standing. The debts are still due on said notes by the Corporation to the Banks in the amounts of

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1960

THE CORAL GABLES FIRST NATIONAL BANK, etc., and PAN AMERICAN BANK OF MIAMI, etc., Appellants, vs. CONSTRUCTORS OF FLORIDA, INC., etc., et al., Appellees.	Case No. 58-526.
CONSTRUCTORS OF FLORIDA, INC., etc., et al., Appellants, vs. THE CORAL GABLES FIRST NATIONAL BANK, etc., and PAN AMERICAN BANK OF MIAMI, etc., Appellees.	Case No. 58-542.
AMERICAN SURETY COMPANY OF NEW YORK, etc., Appellant, vs. THE CORAL GABLES FIRST NATIONAL BANK, etc., and PAN AMERICAN BANK OF MIAMI, etc., Appellees.	Case No. 58-543.
CITY OF WEST PALM BEACH, FLORIDA, etc., Appellant, vs. THE CORAL GABLES FIRST NATIONAL BANK, etc., and PAN AMERICAN BANK OF MIAMI, etc., Appellees.	Case No. 58-544.

Opinion filed March 22, 1960.

Appeals from the Circuit Court for Dade County, Grady L. Crawford, Judge.

Ward & Ward and Salley & Roman, for Coral Gables First National Bank and Pan American Bank of Miami.

Fuller Warren, for Constructors of Florida, Richard R. Reynolds, Jim M. Lancaster, Jr., and Earl L. Goodwin.

John H. Gunn and Thomas A. Horkan, Jr., for John Nicholas.

Egbert Beall, of West Palm Beach, for City of West Palm Beach.

Blackwell, Walker & Gray, for American Surety Company of New York.

Tom Maxey, in propria persona.

HORTON, Chief Judge.

In the main appeal, (=58-526) the appellants Coral Gables First National Bank and Pan American Bank of Miami, hereinafter referred to as Banks, seek review of a partial final decree, as amended, which adjudicated that a certain loan transaction between appellants and appellee Constructors of Florida, hereinafter referred to as Constructors, was usurious. American Surety Company of New York, hereinafter referred to as Surety, the City of West Palm Beach, hereinafter referred to as City, and Richard R. Reynolds, J. M. Lancaster, Jr., and Earl L. Goodwin, the individual officers of Constructors, hereinafter referred to as Individuals, have filed joinders in the main appeal, and, in addition, the following separate appeals have been filed seeking review of this same decree:

In appeal =58-542, appellants Constructors and Individuals contend that the chancellor erred in failing to award them damages in the form of losses sustained as a result of the Banks' action in effecting a loan with a usurious rate of interest and breach of a loan contract.

In appeal =58-543, appellant Surety contends that the chancellor erred in failing to award to Surety damages in

the form of losses sustained as a result of the Banks' intentional fraudulent and tortious acts; in not awarding to Surety punitive damages; and in not granting to Surety additional attorneys' fees.

In appeal #58-544, appellant City contends that the chancellor erred in failing to award to City damages in the form of losses resulting from the tortious interference by Banks in the contract between City and Constructors.

These appeals were consolidated by order of this court and will be treated together in this opinion.

The Banks instituted suit to foreclose three chattel mortgages dated July 24 and July 25, 1956, and March 20, 1957, upon which there was due the sums of $13,888.95, $92,690.85 and $151,802.46, respectively, and to impose liability for any deficiency upon appellees Surety and City.

All defendants served with process filed answers denying liability. Appellees Constructors and Individuals counterclaimed, alleging that the note and mortgage dated March 20, 1957, was a renewal of an earlier note and mortgage dated November 14, 1956, in the sum of $442,400 given by Constructors to the appellant Banks and that said loan was usurious. In essence, the counterclaim alleged that the Banks, by withholding a portion of the proceeds of said loan, and charging and receiving interest in excess of that allowed by law, and by the breach of its loan agreement, directly caused the financial collapse of the appellee Constructors; that such actions by appellants caused Constructors to decline a bona fide offer to purchase 40% of its authorized capital stock for $400,000. Damages totalling more than six million dollars were claimed by Constructors and its officers.

The appellee Surety counterclaimed against appellants, adopting the position as to the usurious nature of the loan

alleged by the appellee Constructors and further claimed damages against the Banks because of alleged false information furnished Surety by the Banks as to the financial condition of Constructors which resulted in the Surety's writing additional bonds for Constructors and deterred Surety from taking over certain contracts of Constructors, all of which allegedly resulted in losses to Surety of more than a million dollars. Surety further cross-claimed against appellee Constructors for sums in excess of one million dollars, and attorneys' fees, allegedly due upon some 63 promissory notes secured by chattel mortgages.

The appellee City counterclaimed, adopting the factual allegations of the answers and counterclaims of the other appellees, and, in addition, contended that the tortious interference of the Banks in contractual relationships between Constructors and the City resulted in the City's being required to take over contracts held by Constructors with City and thereby the City sustained a loss in excess in excess of $200,000.

There were other pleadings by parties to this action, but they do not appear relevant to the issues on these appeals and therefore are not being delineated.

The charge of usury in this case evolved out of a transaction which originally took place on November 14, 1956, when Constructors executed and delivered to the Coral Gables First National Bank a chattel mortgage securing a promissory note in the sum of $442,400. This note was payable in 23 monthly installments of $3,000 each and a 24th installment of $373,400, all with interest at 5% per annum. The note also bore interest from maturity at 8%. The security for this loan was a chattel mortgage on all of the equipment of Constructors, together with an

assignment of payments due Constructors under two sewer contracts, Numbers 7 and 9, with City. At the time of the execution of the $442,400 note and mortgage, Constructors was indebted to the National bank on two prior loans executed in July, 1956, in the original sums of $22,222.32 and $148,305.26, respectively, both loans secured by chattel mortgages on equipment of Constructors, all of which was subsequently repledged as security for the $442,400 loan of November 14, 1956. There was also outstanding an interim loan of $60,000 due by Constructors to the National Bank.

From the proceeds of the $442,400 loan of November 14, 1956, the following disbursements appear to have been made:

1) $60,000 to the Coral Gables First National Bank in repayment of the interim loan by Constructors of Florida.

2) $44,854.44 to the Coral Gables First National Bank as a commitment fee.

3) $44,240 as advanced interest for two years.

4) $90,743.18 was deposited with the Coral Gables First National Bank in Collateral Account #1, held jointly in the names of Constructors of Florida and the Coral Gables First National Bank, withdrawals from which required the signature of an officer of the Bank and the signature of an officer of Constructors of Florida.

5) $202,562.38 to the account of Constructors of Florida.

The commitment fee (item #2 above—$44,854.44) was subsequently transferred by the National bank into Collateral Account #1, making that account total $135,597.62. The funds from Collateral Account #1 were disbursed at

intervals to the account of Constructors over a period of time from November 23, 1956, through January 7, 1957, when the entire account was exhausted.

The National bank established a second account known as Collateral Account #2, in which it deposited the proceeds of payments received by it from City under the assignment of payments given by Constructors to the bank to secure the payment of the November 14, 1956, loan. The following amounts were received by the bank from City and deposited in Collateral Account #2:

November 29, 1956—	$36,488.11
December 24, 1956—	42,750.32
January 24, 1957—	53,247.39
February 26, 1957—	24,168.04
March 1, 1957—	37,502.25

making a total of $194,156.11. It was from Collateral Account #2 that the National bank, from time to time, deducted the monthly payments of $3,000 plus 5% interest due under the terms of the note of November 14, 1956. These deductions were as follows:

Date	Principal	Interest
December 17, 1956	$ 3,000.00	$1,843.35
January 14, 1957	3,000.00	1,893.13
February 14, 1957	3,000.00	1,878.96
March 7, 1957	179,540.67	
Totals	$188,540.67	$5,615.44

In the early part of March, 1957, Constructors, being in straightened financial circumstances, requested the National bank to release approximately $50,000 from Collateral Account #2 to the general account of Constructors. The request for the release of these funds was made by

letter from Constructors to the National bank and accompanied by a statement which purported to justify the requested funds. After some negotiation with an officer of Constructors, the bank agreed that $50,000 would be advanced to the general account of Constructors out of Collateral Account =2, and in accord with that agreement, an officer of Constructors left with an officer of the National bank a signed, undated blank check. Instead of making the transfer of the $50,000, as Constructors alleged it was agreed, the check was filled in by some officer or employee of the National bank for the sum of $179,540.67 (which was the total amount remaining in Collateral Account =2), countersigned by an officer of the bank, and applied against the balance due on the $442,400 note. It is contended that this application by the National bank was made without the knowledge or consent of Constructors.

After the National bank had applied the $179,540.67 as aforesaid, a meeting was had among all of the parties which resulted in the execution of a new note, termed a renewal note, dated March 20, 1957, for the sum of $218,275.27, bearing interest at the rate of 15% per annum. At the same time, a usury release was executed by Constructors in favor of the National bank. There was also executed at this time a loan repayment agreement in which it was stipulated that from payments received on sewer contracts Numbers 7 and 9 with the City, the National bank would apply 65% against the indebtedness due the bank by Constructors, and 35% would be deposited into a controlled account to be used by Constructors. The March 20, 1957, note for $218,275.27 was, at the time of the Institution of this suit, reduced by payments to $151,802.46.

Coral Gables First National Bank, as indicated by its name, is a national banking institution chartered under the laws of the United States, and is not permitted to lend

amounts in excess of 10% of its capital and surplus. In this instance, its limit was $200,000.00. The Pan American Bank of Miami, being a state chartered institution, had no such limitation. It appears, therefore, that when the loan of November 14, 1956, was made, or shortly thereafter, the appellant Pan American was a participant in this loan to the extent of approximately $243,320. The chancellor made a finding regarding the entire participation between the two appellant Banks in the decree from which appeal is taken.[1]

The chancellor found, among other things, that the interest charged and reserved by the Banks on account of the November 14, 1956, loan exceeded 25% per annum; that appellant Banks were joint adventurers and agent and principal each for the other, and imposed penalties against the National bank under the terms of the Federal Banking Code (12 U.S.C.A., S86) and the State bank under

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(1) "However, Pan American Bank of Miami, as participant in each of these three (3) loans, was debited by Coral Gables First National Bank with the sums of $19,444.53, $129,767.19, and $243,320.00, or a total of $392,531.72. Actually, therefore, Coral Gables First National Bank was merely a conduit, and agent; the new loan of $442,400.00 did not, according to the books and records of Coral Gables First National Bank, increase the net amount of the indebtedness of Constructors of Florida, Inc.; rather, the net amount of indebtedness to Coral Gables First National Bank, after the new loan of $442,400.00, actually decreased from $209,211.62 to $19,242.38, a net decrease of $188,969.24. In other words, immediately prior to the consummation of the alleged $442,400.00 loan on November 14, 1956, Constructors of Florida, Inc. was indebted to Coral Gables First National Bank in the amount of $209,211.62; immediately after the consummation of the alleged (sic) $442,400.00 loan, Constructors of Florida, Inc. was indebted to Coral Gables First National Bank only in the small amount of $19,242.38. By loaning $393,531.72 of the money of Pan American Bank of Miami, Coral Gables First National Bank decreased its outstanding loans by $188,969.24."

the terms of S687.07, Fla. Stat., F.S.A. The penalties imposed by the chancellor are summarized as follows:

(a) Liability of Coral Gables First National Bank		
(1) Double the interest collected to March 20, 1957	$ 99,710.88	
(2) Double the interest collected subsequent to March 20, 1957	10,740.70	
	$110,451.58	
Less amount credited to principal on renegotiation	35,584.06	
Total		$ 74,867.52
(b) Liability of Pan American Bank of Miami		
(1) Principal & interest paid to March 20, 1957	$194,156.11	
(2) Principal paid subsequent to March 20, 1957	66,472.81	
(3) Interest paid subsequent to March 20, 1957	5,370.35	
Total		$265,999.27
(c) Liability of Both Plaintiff Banks		
For cancellation of principal and interest remaining due		$172,585.29

The chancellor further found that the notes of July 24, 1956, and July 25, 1956, secured by chattel equipment mortgages, were not in default and could be paid in accordance with their respective terms with principal payments held in abeyance from the time of the alleged default to the time of the entry of a complete final decree in this cause; that the liens of City and Surety against the chattels and equipment of Constructors were superior to any claim of the Banks in this proceeding.

The chancellor found that the evidence was not sufficient to prove by a preponderance that Banks were solely responsible or liable for (1) damages suffered by Constructors resulting from the collapse of its business and forfeiture of its contracts; (2) damages suffered by Individuals resulting from the loss of value of the stock of Constructors, loss of profit, or liability of personal guarantees other than those given to Banks; (3) damages suffered by City in connection with the completion of sewer contracts Numbers 7 and 9; and (4) damages suffered by Surety on account of various bonds written or continued for Constructors and Island Construction Company.

The chancellor found that the evidence did show that (1) City did not agree in any way to guarantee any part of the loan made by Banks to Constructors and there was no basis for equitable subrogation in favor of Banks and against City; (2) City is protected in the amounts expended to complete sewer contracts Numbers 7 and 9 by bonds written by Surety; (3) Surety did not agree in any way to guarantee any part of the loans made by Banks to Constructors and there was no basis for any equitable subrogation in favor of Banks and against Surety; (4) Constructors was indebted to Surety in the amount of $1,367,379.19 on account of the various bonds written and continued for Constructors or guaranteed by Constructors; and (5) Constructors should recover against Banks for payment to Surety reasonable attorneys' fees in the amounts of $45,000 and $27,347.50 as part of the consequential damages resulting from the Banks' usurious charges and the improper manner in which the loan accounts were handled by them.

The Banks' main contention is that the transaction was not usurious. They urge that the loan was not usurious at its inception and assuming, but not admitting,

that it might have been, that the same was eliminated by a new contract purging the old contract of the vice of usury and making the new a valid and enforceable obligation. These arguments are without substance, particularly when viewed in the light of the evidence adduced before the chancellor. The chancellor's findings of fact and conclusions as to the usurious character of this transaction are amply supported by the record. To demonstrate that there was usury from its inception would unduly extend an already lengthy opinion. Suffice it to say that where a borrower receives a net of approximately $263,000 from a $442,400 loan, it requires little mathematical calculation to discern that something is amiss.

The Banks' secondary argument that a new contract was entered into that purged the old of its usurious odor is not borne out by the record, including their own pleadings. The Banks, in their complaint seeking foreclosure of the mortgage in question, affirmatively alleged that "on March 20, 1957, there was due and unpaid on said note of $442,400 (plaintiff's Exhibit 3) the principal sum of $218,275.27 as evidenced by a *renewal contract note* of that date in the sum of $218,275.27. * * * Plaintiffs would show unto the Court that *said renewal note* of $218,275.27 *was simply a renewal and extension of the note of November 14, 1956*, in the sum of $442,400 * * *." (Emphasis supplied). The general rule followed in this state is that the usurious character of a contract must be determined as of the date of its inception, and if usurious at that time, no subsequent transactions will purge it. When such contracts are *renewed* by a *new* or *substituted contract, usury follows* and becomes a part of the latter contract, making it vulnerable to the defense of usury in like manner as the original contract. This is not true, however, *when the old contract is abandoned* and *a new one is entered into*

free from the vice of the old. See Shorr v. Skafte, Fla. 1956, 90 So.2d 604, and Wenck v. Insurance Agents Finance Corp., Fla. App. 1958, 99 So.2d 883.

Banks further urge that the chancellor was in error in imposing upon the National bank penalties in excess of that permitted by S 86, Title 12, U.S.C.A., and in imposing upon the State bank affirmative penalties in excess of $265,000, when the State bank held only a 5% participation in the renewal note of March 20, 1957; also that a portion of the $265,000, penalty, representing principal paid on the March 20, 1957, note, was wrongfully assessed against the State bank when the evidence shows that such payment was made to the National bank.

Sections 85 and 86, Title 12, U.S.C.A., in substance provide that a National bank may take, receive, reserve and charge interest at the rate allowed by the laws of the state where the bank is located and when a greater is knowingly charged, *the entire interest provided for by the note, etc., shall be forfeited.* Where the interest has been *paid*, the person so paying it may *recover back twice the amount paid.* No other penalties are provided and the Federal Courts, as well as a majority of the State courts, have held that no other penalties except those provided in the Act can be invoked against a National bank. See Farmers' etc., Nat. Bank v. Dearing, 91 U.S. 29, 23 L.Ed. 196 (1875) and subsequent cases collected at 12 U.S.C.A. 343.

The Banks argue that some of the penalties assessed against the National bank are in excess of those permitted under the Federal Act, insisting that the only penalty that should be imposed against the National bank is double the amount of interest actually *paid.* This argument is premised on the fact that there may have been usury in the original loan of November 14, 1956, but in no event could such penalties be applied as against the interest collected

after March 20, 1957, the date of the renegotiation of the original loan. Concluding as we have that the original loan was usurious, we reject this contention of the Banks as being without merit.

Another question raised collateral to the Banks' argument that penalties were unlawfully and illegally assessed against the National bank, is that portion of the decree which voided the right of both Banks to collect the balance of $151,802.46, plus interest, the sum allegedly remaining due and unpaid on the renegotiated loan of March 20, 1957. This latter contention of the Banks is bottomed upon the factual premise that the State bank had a participation of only 10% in the renegotiated loan, with the balance of the loan allegedly represented by the funds of the National bank. This contention has partial merit, that is to say, that the Federal Act applicable to National banks as well as the decisions construing the same have almost unanimously concluded that only those penalties provided by the Federal Act could be invoked against a National bank. However, the record in this case discloses, and the chancellor found, that the loan was usurious in its inception, i.e., November 14, 1956. We have concurred in this conclusion; consequently, it is necessary to analyze the status of the participation of the respective banks at the time that the loan was found to be usurious. On November 14, 1956, or shortly thereafter, the National bank participated to the State bank $243,320 of the original loan. However, since the record clearly demonstrates, and the chancellor found, that the borrower received at most approximately $263,000 from the loan of $442,400, it would follow that the State bank's participation in the funds actually made available to the borrower was in excess of 92% of the amounts loaned. Likewise, it follows that the National bank would have furnished slightly in excess of 7% of the original monies loaned. A careful scrutiny of the

proceedings that took place at the time of and subsequent to the making of the original loan indicates that by the device of participation, the State bank attempted to lend its funds through a chartered National bank without subjecting itself to the loss of its principal in the event that the loan was found to be usurious under S 687.07, Fla.Stat., F.S.A. The most that the State bank could lose if this device was unsuccessful, using the National bank as its conduit, would be double the interest actually received by the National bank or a forfeiture of interest that was to accrue. In the final analysis, we conclude that the chancellor was correct in forfeiting interest due and unpaid as it applied to both the State and National banks, but that he was in error when he decreed a forfeiture of the entire amount of principal. Such portion of the remaining unpaid principal on the original loan, hereinabove noted to be approximately 7%, as had not been participated by the National bank to the State bank should have been reserved by the chancellor's decree to the National bank rather than forfeited. In forfeiting that portion of the unpaid balance of the principal belonging to the National bank, the chancellor's decree conflicts with the decisions of the Federal courts as well as those of many state courts of last resort, which hold that only the penalties prescribed by the Federal Act can be invoked against a national bank, namely an affirmative forfeiture of double the amount of interest actually paid or a cancellation or forfeiture of interest that is to accrue and is unpaid.

Another question raised by the Banks was the propriety or correctness of that portion of the decree awarding against Banks, as consequential damages, attorneys' fees contracted to be paid by Constructors to Surety under the terms of a general indemnity agreement between said parties. This arose out of the chancellor's award to Surety of sums due it under the general indemnity agreement as

claimed in Surety's counterclaim against Constructors. We think the award of attorneys' fees against the Banks was erroneous, first because attorney's fees as such cannot be awarded in the absence of statute or contract. See Hoffman v. Barlly, Fla. App. 1957, 97 So.2d 355, and cases cited therein. Secondly, the award would appear to be inconsistent with the chancellor's finding that the evidence was insufficient to establish that the Banks were solely responsible for all damage suffered by Constructors resulting from the collapse of its business. In either event, we see no basis for the award of attorneys' fees here against the Banks.

The Banks have urged other points for reversal and they have been duly considered, but found to be without merit.

Upon the appeal of Constructors and Individuals (#58-542) they claim error in the failure of the chancellor to award them damages in the form of losses suffered by each as a consequence of the Banks' tortious breach of contract including the act of charging a usurious rate of interest. This may be the rule as applied to torts generally, but these appellants have not cited any authority, and our research has failed to uncover any, that permits an award of consequential damages resulting from a violation of the usury statute in addition to the penalties prescribed by that statute. The Supreme Court of Florida long ago in Matlack Properties v. Citizens and Southern Nat. Bank, 120 Fla. 77, 162 So. 148, held that but for the statute usury was not forbidden, indicating that the subject of usury was one entirely of statutory regulations and prohibition. See Yaffee v. International Company, Fla. 1955, 80 So.2d 910. See also Sodi, Inc. v. Salitan, Fla. 1953, 68 So.2d 882. Further, the Supreme Court of Florida, in Rosenblum v. Hart, Fla. 1957, 95 So.2d 18, held that the penalties provided for

under SS 687.04 and 687.07, Fla. Stat., F.S.A., are not cumulative but must be applied separately to the degrees of usury defined by the statutes. Nevertheless, from our review of the record, we conclude, as did the able chancellor, that appellants failed to prove, by a preponderance of the evidence, that Banks were solely responsible or liable for all damages suffered by appellants.

The contentions of Surety and City, as evidenced by their appeals, (#58-543 and #58-544, respectively) and assignments of error therein, simply take issue with the chancellor's conclusions based upon the evidence. We have carefully considered the points raised by each appellant but are constrained to conclude that there was competent substantial evidence in the record to support the findings and conclusions of the chancellor.

The record in this case included approximately 2,000 pages of testimony and more than 100 exhibits. Able counsel for the parties on both sides are to be commended for clarity as well as brevity in the presentation of a complicated and voluminous factual case.

In the light of the views expressed, we conclude that the chancellor, in imposing against the National bank as a penalty, the forfeiture of a portion of the unpaid principal of $151,802.46 not participated to the State bank, committed error; that upon a remand of this cause, he should ascertain and determine this amount, and enter an appropriate decree reserving the same to the National bank. We further conclude that the decree, insofar as it awards against Banks attorneys' fees to Constructors, is in error and the same is hereby reversed. In all other respects, the decree appealed is affirmed.

Affirmed in part, reversed in part and remanded with directions.

PEARSON and CARROLL, CHAS., JJ., concur.

MANDATE FROM DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

To the Honorable, the Judges of the CIRCUIT Court for the ELEVENTH JUDICIAL CIRCUIT of Florida, Greeting:

WHEREAS, Lately in the CIRCUIT Court of THE ELEVENTH JUDICIAL CIRCUIT IN AND for the County of DADE in a cause wherein

THE CORAL GABLES FIRST NATIONAL BANK, etc., and PAN AMERICAN BANK OF MIAMI, etc.,
plaintiffs

and

CONSTRUCTORS OF FLORIDA, INC., et al.,
defendants

(Chancery No. 205613.)

the decree of said Circuit Court was rendered June 30, 1958 as by the inspection of the transcript of the record of the said Circuit Court which was brought into the District Court of Appeal, Third District of the State of Florida, by virtue of appeals agreeably to the laws of said State in such case made and provided, fully and at large appears.

AND WHEREAS, at the JANUARY Term of said District Court of Appeal holden at Miami, A.D., 1960, the said cause came on to be heard before the said District Court of Appeal on the said record of March, A.D., 1960, the said District Court of Appeal rendered its opinion and judgment in said cause as per copy thereof hereto attached and made a part hereof.

In Consideration Whereof, It is Ordered by the Court that the appellants do have and recover of and from the

appellees costs in this behalf expended herein taxed at Twenty-five Dollars, and that all other costs shall be taxed in the court in which the appeal was entered, therefore

YOU ARE HEREBY COMMANDED, That such further proceedings be had in said cause as according to right, justice, the judgment of said District Court of Appeal and the laws of the State of Florida, ought to be had, the said decree of the Circuit Court notwithstanding.

WITNESS, The Honorable MALLORY HORTON, Chief Judge of said District Court of Appeal, and the seal of said Court at Miami, this 4th day of May, 1960.

/s/ WILLIAM P. CARTER,
Clerk District Court of Appeal of Florida, Third District.

A True Copy

ATTEST:

William P. Carter,
Clerk District Court of Appeal,
Third District.

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA.
IN CHANCERY.

Case No. 205613-E (Crawford).

THE CORAL GABLES FIRST NATIONAL BANK and PAN AMERICAN BANK OF MIAMI,
Plaintiffs,

vs.

CONSTRUCTORS OF FLORIDA, INC., etc., et al.,
Defendants.

ORDER AND JUDGMENT ON MANDATE.

THIS CAUSE came on to be heard pursuant to notice on the motion of plaintiffs for findings and decree on mandate; on the response thereto of defendants; and on the motion of defendants for judgment or decree on mandate. The Court having considered said motions and response, as well as the exhibits thereto annexed, and having heard argument of counsel thereon, and having considered the Opinion and Mandate of the District Court of Appeal of Florida, Third District, filed herein on May 5, 1960, is of the opinion that the various proceedings for the re-organization of defendant, CONSTRUCTORS OF FLORIDA, INC., in no way supersede the jurisdiction of this Court to comply with said Opinion and Mandate, and that the Motion for Order on Mandate filed herein by plaintiffs should be, and it is hereby denied.

It appearing that the directions of said District Court of Appeal require this Court to make certain additional findings of fact, and to modify this Court's Partial Final Decree entered herein on June 26, 1958, as amended July 2, 1958, and upon consideration of the evidence hereto-

fore adduced before this Court, the Court makes the following additional findings of fact:

(a) The borrower, CONSTRUCTORS OF FLORIDA, INC., received on November 14, 1956, out of the proceeds of the loan of the same date, the sum of $262,562.38.

(b) Of the aforesaid amount actually received by the borrower, and by reason of the participation of the State Bank therein to the extent of $243,320.00, the National Bank advanced only $19,242.38, or 7.33% of the funds actually received by the borrower.

(c) That the principal amount due on the said note of November 14, 1956, as of the institution of this action, was $151,802.46; and that 7.33% of $151,802.46 is $11,271.20.

It is, therefore, ORDERED, ADJUDGED and DECREED that this Court's Partial Final Decree of June 26, 1958, as amended July 2, 1958, is modified in the following respects:

1. The sum of $11,271.20, being the portion of the unpaid principal not participated by the National Bank to the State Bank on the loan of November 14, 1956, is reserved to the National Bank; but the mortgage securing said obligation is void and unenforceable in these proceedings, as said Bank is not in equity with clean hands.

2. So much of said Partial Final Decree as awards to CONSTRUCTORS against Banks consequential damages based upon attorney's fees awarded to SURETY against CONSTRUCTORS in the amounts of $45,000 and $27,347.50, is vacated, set aside and quashed only as to Banks.

OTHERWISE, said Partial Final Decree of June 26, 1958, as amended July 2, 1958, is hereby re-affirmed and re-adopted, and remains in full force and effect.

And it is further ORDERED, ADJUDGED and DECREED:

I. That JOHN NICHOLAS, as Trustee for CONSTRUCTORS OF FLORIDA, INC., on his counterclaim, have and take from the plaintiff CORAL GABLES FIRST NATIONAL BANK, the principal sum of SEVENTY-FOUR THOUSAND EIGHT HUNDRED SIXTY-SEVEN DOLLARS AND FIFTY-TWO CENTS ($74,867.52), with interest as provided by law from July 2, 1958, for which sums let execution immediately issue.

II. That JOHN NICHOLAS, as Trustee for CONSTRUCTORS OF FLORIDA, INC., on his counterclaim, have and take from the plaintiff, PAN AMERICAN BANK OF MIAMI, the principal sum of TWO HUNDRED SIXTY-FIVE THOUSAND NINE HUNDRED NINETY-NINE DOLLARS AND TWENTY-SEVEN CENTS ($265,999.27), with interest as provided by law from July 2, 1958, for which sums let execution immediately issue.

III. That CONSTRUCTORS OF FLORIDA, INC. is indebted to CORAL GABLES FIRST NATIONAL BANK and PAN AMERICAN BANK OF MIAMI in the amounts of FOURTEEN THOUSAND THREE HUNDRED TWENTY-SIX DOLLARS AND SEVENTY-SEVEN CENTS $14,326.77), and NINETY-FIVE THOUSAND SIX HUNDRED THIRTY-SIX DOLLARS AND SEVENTY-SEVEN CENTS ($95,636.77), principal and interest included to May 1, 1958, respectively, on the loans of July 25, 1956, and July 24, 1956; but the mortgages allegedly securing said loans are not enforceable as said Banks are not in equity with clean hands. Said loans were not in default as of the commencement of this action. The Court does not determine whether or not said loans are now in default inasmuch as the United States District Court for the Southern District of Florida, in the proceedings for the re-organization of CON-

STRUCTORS OF FLORIDA, INC. has assumed jurisdiction of said claims.

IV. That CONSTRUCTORS OF FLORIDA, INC. is indebted to CORAL GABLES FIRST NATIONAL BANK in the amount of ELEVEN THOUSAND TWO HUNDRED SEVENTY-ONE DOLLARS AND TWENTY CENTS ($11,271.20) on the loan of November 14, 1956; but the mortgages allegedly securing said loan are not enforceable as said Banks are not in equity with clean hands. Said loan was not in default as of the commencement of this action. The Court does not determine whether or not said loan is now in default inasmuch as the United States District Court for the South District of Florida, in the proceedings for the re-organization of CONSTRUCTORS OF FLORIDA, INC., has assumed jurisdiction of said claims.

V. That the amounts awarded JOHN NICHOLAS as Trustee for CONSTRUCTORS OF FLORIDA, INC. by Paragraphs I and II hereof are not subject to offset by reason of the claims of Banks against CONSTRUCTORS OF FLORIDA, INC. as set forth in Paragraphs III and IV hereof.

VI. That plaintiff, PAN AMERICAN BANK OF MIAMI, and plaintiff, CORAL GABLES FIRST NATIONAL BANK, take nothing on account of their claims against the defendants, AMERICAN SURETY COMPANY OF NEW YORK, City of West Palm Beach, RICHARD R. REYNOLDS, JIM M. LANCASTER, Jr. and EARL L. GOODWIN.

VII. That counterclaimants, RICHARD R. REYNOLDS, JIM M. LANCASTER, Jr. and EARL L. GOODWIN, take nothing on their counterclaims against Plaintiff-Banks.

VIII. That counterclaimant, AMERICAN SURETY COMPANY OF NEW YORK, take nothing on its counterclaim against Plaintiff-Banks.

IX. That the lien of AMERICAN SURETY COMPANY OF NEW YORK on the chattels and equipment of CONSTRUCTORS OF FLORIDA, INC. on account of the Chattel Mortgage sought to be foreclosed herein, in the principal amount of ONE MILLION THREE HUNDRED SIXTY-SEVEN THOUSAND THREE HUNDRED SEVENTY-NINE DOLLARS AND NINETEEN CENTS ($1,367,379.19), and interest thereon, plus attorney's fees in the amount of SEVENTY-TWO THOUSAND THREE HUNDRED FORTY-SEVEN DOLLARS AND FIFTY-EIGHT CENTS ($72,347.58), is superior to any claim of Banks asserted herein; but the Court reserves decision as to the various claims and counterclaims asserted between the Trustee and AMERICAN SURETY COMPANY OF NEW YORK, pending the outcome of the second phase of this action.

X. Costs of this proceeding are hereby taxed against the Banks in an amount to be hereafter determined on motion of the defendants.

DONE and ORDERED at Miami, Florida this 14th day of April 1961.

s/ GRADY L. CRAWFORD
CIRCUIT JUDGE.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY.
IN CHANCERY.

NO. 205613-E
(Crawford).

THE CORAL GABLES FIRST NATIONAL BANK and PAN AMERICAN BANK OF MIAMI,
Plaintiffs,
vs.
CONSTRUCTORS OF FLORIDA, INC., etc., et al.,
Defendants.

(Filed April 17, 1961.)

NOTICE OF INTERLOCUTORY APPEAL.

COME NOW the Plaintiffs, CORAL GABLES FIRST NATIONAL BANK, a United States Banking corporation, and PAN AMERICAN BANK OF MIAMI, a State Banking corporation, organized under the laws of the State of Florida, by and through their attorneys of record, and take and enter their Interlocutory Appeal to the District Court of Appeal in Florida, Third District, to review the Order and Judgment on Mandate entered on the 14th day of April, 1961, in the above entitled cause, recorded in Chancery Order Book 1511 at Page 8, and the Order of said Court dated the 17th day of April, 1961, striking the Petition for Re-Hearing, which said Order was entered on the 17th day of April, 1961, and recorded in Chancery Order Book at Page

This is an Interlocutory Appeal under the provisions of Florida Appellate Rules 4.2, being an Order or Decree

entered after Final Decree, and all parties to said cause are called upon to take notice of the entry of this appeal.

DATED at Miami, Florida, this 17th day of April, 1961.

WARD & WARD,
By: s W. G. WARD,
Attorneys for Coral Gables First National Bank.

WILLIAM B. ROMAN AND LEO L. FOSTER,
By: s WILLIAM B. ROMAN,
Attorneys for Pan American Bank of Miami.

I HEREBY CERTIFY that a true and correct copy of the above Notice of Interlocutory Appeal was mailed to the Attorneys for the Defendants in the above entitled cause, to-wit:

JOHN GUNN, Attorney for JOHN NICHOLAS, as Trustee under chapter X, Federal Bankruptcy Reorganization Proceedings now pending in the United States District Court, Southern District of Florida;

W. L. GRAY, Attorney for AMERICAN SURETY COMPANY OF NEW YORK.

FULLER WARREN, Attorney for CONSTRUCTORS OF FLORIDA, INC., and or JOHN NICHOLAS, as Receiver of CONSTRUCTORS OF FLORIDA, INC.

W. L. GRAY, TOM MAXEY, and EGBERT BEALL, Attorneys for City of West Palm Beach.

FULLER WARREN as Attorney for Richard R. Reynolds, Jim M. Lancaster, Jr., and Earl L. Goodwin, and

TOM MAXEY, as a Defendant in his own right.

DATED April 17, 1961.

WARD & WARD,
By: s W. G. WARD

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY.
IN CHANCERY.

NO. 205613-E (Crawford).

THE CORAL GABLES FIRST NATIONAL BANK and PAN AMERICAN BANK OF MIAMI,
Plaintiffs,

vs.

CONSTRUCTORS OF FLORIDA, INC., etc. et al.,
Defendants.

ASSIGNMENTS OF ERROR.

Comes now the plaintiffs The Coral Gables First National Bank and Pan American Bank of Miami, and pursuant to the provisions of Rule 4.2 of the Appellate Rules of Florida, assigns as error in support of the interlocutory appeal filed herein, the following matters upon which the plaintiffs rely for reversal of the decree of the lower Court.

That the Circuit Court of Dade County, Florida, in the entry of its judgment on mandate dated April 14, 1961, committed the following errors:

1. That the lower Court did not follow the laws as established by this Court in its order of reversal, in that it allowed as a penalty under the Federal Usury Statute applicable to National Banks, a sum in excess of twice the amount of the interest actually paid by Constructors of Florida, Inc. to the National Bank.

2. That the Court in its judgment of the 14th day of April, 1961, improperly construed the provisions of Section 687.03 of the Florida Statutes as amended in 1955 in holding that on a corporate loan the Court consider the us-

ury penalty where the usury was contracted for or reserved, whereas the Statute as amended only applies to a corporate loan where usury in excess of 15% was paid.

3. The Court in its opinion erred in finding that the Pan American Bank of Miami had received interest payments from Constructors of Florida, when in the other part of its opinion it showed that all of the interest either paid or contracted for was charged at a double rate against the Coral Gables First National Bank, and the only interest, if any, that the Pan American Bank received was on payments made by the National Bank to the Pan American Bank.

4. The Court erred in its opinion in holding as against the National Bank under the Federal Statute governing usury of National Banks that interest reserved in advance was interest paid so as to affect the usury penalty under the State or Federal laws, where a corporation borrower is involved.

5. The Court below in its opinion erred in decreeing forfeitures of the security on some $135,000 of allowed claims in favor of the Coral Gables First National Bank, which would be penalty or punitive damages in excess of any provision contained in the Federal or Florida Statutes for usury penalties.

6. The lower Court erred in its judgment in refusing to grant setoffs of the usury penalties as allowed, as against the claims found to be just and payable in favor of the plaintiffs, contrary to the Florida Laws and the provisions of Section 68, of the National Bankruptcy Act.

7. The Court erred in holding in its final judgment that the mortgage of the American Surety Company which was subsequent in date and priority of the mortgages of the Bank was superior to any mortgage claim or lien of the plaintiff Banks.

8. The lower Court erred in its judgment in holding that the 1955 amendment to usury statute applicable to corporations was inoperative and invalid, and by applying the rule against corporations the same as if an individual had been borrowing the money under the provisions of 687.03.

9. The Court below erred in computing the ratio of principal payments advanced by the Coral Gables First National Bank at 7.33% of the total advanced, and ignoring the additional principal advanced by the National Bank of $135,597.62, which would make the ratio in any event of 55% to the State Bank, and 45% to the National Bank.

10. The Court erred in failing to setoff the cost of the appeal in the first instance, cost of which was assessed by the Mandate of the District Court of Appeal against the appellees.

11. The Court erred in holding that it had not lost jurisdiction of the subject matter, and of the parties in this case by virtue of the changes of the parties, and the status of security pending the appeal to the District Court of Appeal of Florida.

12. The Court erred in refusing to dismiss this cause without prejudice and referring the entire matter to the U. S. District Court, Southern District of Florida, for further proceedings under the National Bankruptcy Reorganization Act.

13. The Court erred in its final decree in taking away the prime security held by the Coral Gables First National Bank as a forfeiture or penalty on the previous mortgages, which were not even alleged to be tainted with usury, and thus taking property of the National Bank without due compensation, or without due process of law.

14. The Court erred in its final judgment in arbitrarily finding that an inferior mortgage held by American

Surety Company was prior in dignity to the prior recorded mortgages held by the National Bank, under the theory that the Banks had come into equity without clean hands, this amounting to a deprivation of the plaintiff Banks Constitutional property rights guaranteed by the State of Florida, and the United States Constitution.

WARD & WARD,
1240 duPont Bldg.,
Miami 32, Florida,
By /s/ W. G. WARD,
Attorneys for Coral Gables National Bank.

LEO FOSTER AND WILLIAM B. ROMAN,
By /s/ WILLIAM B. ROMAN,
Attorneys for Pan American Bank of Miami.

I HEREBY CERTIFY that a copy of the foregoing assignments of error was provided to counsel of record for the defendants, this 17th day of April, A.D., 1961.

/s/ W. G WARD.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT.

JANUARY TERM, A.D., 1961.

THURSDAY, MAY 25, 1961.

CASE NO. 61-230.

THE CORAL GABLES FIRST NATIONAL BANK and PAN AMERICAN BANK OF MIAMI,
Appellants,

vs.

CONSTRUCTORS OF FLORIDA, INC., etc., et al.,
Appellees.

This cause having come on before the court on appellees' motion to quash interlocutory appeal and the court having considered same, it is ordered that said motion is granted and this interlocutory appeal from the Circuit Court of Dade County, Florida (Chancery No. 205613) be and the same is hereby quashed.

It is further ordered that appellees' motion to assess damages is hereby denied.

A True Copy

ATTEST:

William P. Carter
Clerk District Court of Appeal,
Third District.

(Seal)

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1961
MONDAY, JULY 24, 1961

61,230.

THE CORAL GABLES FIRST NATIONAL BANK, a banking institution organized under the laws of the United States of America, etc., et al.,
Petitioners,

vs.

CONSTRUCTORS OF FLORIDA, INC., a Florida corporation, et al.,
Respondents.

(Filed 1961, September 27.)

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal of Florida, Third District, in said cause bearing date May 26, 1961, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A True Copy

TEST:

/s/ Guyte P. McCord
Clerk Supreme Court.

By:
Deputy Clerk.

(Seal)

A True Copy

ATTEST:

/s/ William P. Carter
Clerk District Court of Appeal, Third District.

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A.D. 1961

TUESDAY, SEPTEMBER 26, A.D. 1961

61,230.

THE CORAL GABLES FIRST NATIONAL BANK,
a banking institution organized under the laws of the United States of America, etc., et al.,
Petitioners,

vs.

CONSTRUCTORS OF FLORIDA, INC.,
a Florida corporation, et al.,
Respondents.

(Filed 1961, September 27.)

On consideration of the Petition for Rehearing filed by Attorneys for Petitioners,

IT IS ORDERED by the Court that the said petition be, and the same is hereby, denied.

A True Copy,

TEST:

/s/ Guyte P. McCord
Clerk Supreme Court.

(I HAVE TODAY MAILED TO THE CLERK OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, ORDER OF JULY 24, 1961, DENYING PETITION FOR WRIT OF CERTIORARI IN THE ABOVE CAUSE.)

A True Copy,

ATTEST:

/s/ William P. Carter
Clerk District Court of Appeal,
Third District.

(Seal)